TRANSCRIPT OF RECORD

Supreme Court of the United States.

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN, APPELLANT,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 15, 1936.

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[fol. a]

IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at the Court of Appeals Hall, in the City of Albany, on the 19th day of May, in the year of our Lord one thousand nine hundred and thirty-six, before the Judges of said Court.

Witness, the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

MARIAN S. HONEYMAN, Appellant,

ag'st

HERBERT G. HANAN, as Exr. &c., Respondent

REMITTITUR—May 20, 1936

Be it Remembered, that on the 2nd day of April, in the year of our Lord one thousand nine hundred and thirty-six, Marian S. Honeyman, the appellant, in this cause, came here into the Court of Appeals, by Robert B. Honeyman, her attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Herbert G. Hanan, as executor, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Anthony F. Tuozzo, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert B. Honeyman, of counsel for the appellant; and by Mr. James S. Brown, Jr., of counsel for the respondent; and after due deliberation had thereon, [fol. b] did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

And afterwards to wit, on the 5th day of June 1936, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, It is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerks Office

Albany, May 20, 1936.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the attached thereto.

(Seal.) John Ludden, Clerk.

[fol. c] SIR:

Please take notice that the within is a true copy of a Remittitur this day filed herein in the office of the Clerk of Kings County.

Dated, N. Y., June 12, 1936.

Yours, etc., Anthony F. Tuozzo, Attorney for Defendant, Office and Post Office Address, 66 Court Street, Borough of Brooklyn, New York City.

To Robert B. Honeyman, Esq., Attorney for Plaintiff.

Due and timely service of a copy of the within Rec'd June 17/36, is hereby admitted.

Dated, N. Y., —— —, 193-.

——, Attorney for ——.

[fol. d] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER AMENDING REMITTITUR—June 5, 1936

A motion to amend the remittitur in the above cause having been heretofore made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, and said remittitur amended by adding thereto the following:

A question under the Federal Constitution was presented and necessarily passed upon by this Court. The plaintiff contended that Chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Sections 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate Article 1, Section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of Article 1, Section 10, of the Constitution of the United States.

And, the Supreme Court of the State of New York is [fol. e] hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk.

[fol. f] SIR:

Please take notice that the within is a true copy of an Order entered herein in the office of the Clerk of Kings County on the 12th day of June, 1936.

Dated, N. Y., June 12th, 1936.

Yours, etc., Anthony F. Tuozzo, Attorney for Defendant, Office and Post Office Address, 66 Court Street, Borough of Brooklyn, New York City.

To Robert B. Honeyman, Esq., Attorney for Plaintiff.

Due and timely service of a copy of the within Rec'd June 17/36, is hereby admitted.

Dated, N. Y., —— —, 193-.

——, Attorney for ——.

[fol. 1] IN COURT OF APPEALS OF NEW YORK

MARIAN S. HONEYMAN, Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hannan, Deceased, Respondent

STATEMENT UNDER RULE 234

The above-entitled action was commenced by the service of the summons and complaint upon the defendant on May 10, 1935. On May 28, 1935, the amended complaint was served, and on June 11, 1935, motion papers were served by respondent to dismiss cause of action.

The order of the Special Term granting the motion was entered July 3, 1935, and judgment was entered thereon on July 12, 1935, dismissing the complaint and for costs. The Appellate Division affirmed the order and judgment of the Special Term by order entered December 30, 1935, and the judgment of affirmance was duly entered in the office of the Clerk of Kings County on January 13, 1936. Motion was made in the Appellate Division for leave to appeal, which was denied, and on motion the Court of Appeals granted leave to appeal.

There has been no change of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF KINGS

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that the appellant above named hereby appeals to the Appellate Division of the Supreme Court in and for the Second Judicial Department from the order of the Special Term of the Supreme Court dismissing appellant's amended complaint, entered and filed in the office of the Clerk of the County of Kings on the 3rd day of July, 1935, and from the judgment of the Spe-

cial Term of the Supreme Court, in the above-entitled action, entered and filed in the office of the Clerk of the County of Kings on the 12th day of July, 1935, in favor of the defendant and against the plaintiff, for the sum of Fif-
[fol. 3] teen and 95/100 Dollars ($15.95), and from each and every part of said order and judgment.

Dated, New York, August 1st, 1935.

Yours, etc., Robert B. Honeyman, Attorney for Appellant, No. 61 Broadway, Borough of Manhattan, New York City.

To The Clerk of the County of Kings. Anthony F. Tuozzo, Esq., Attorney for Respondent, 66 Court Street, Brooklyn, N. Y.

In Supreme Court of New York, County of Kings

Order Granting Motion for Judgment—July 3, 1935

The defendant having moved this Court for judgment, [fol. 4] pursuant to Rule 106 of the Rules of Civil Practice, dismissing the plaintiff's amended complaint herein upon the ground that it appears on the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action against the defendant, and said motion having come duly on to be heard before me on the 17th day of June, 1935, and after hearing Anthony F. Tuozzo, attorney for the defendant, by James S. Brown, Jr., of counsel, and after reading and filing the notice of motion dated June 11th, 1935, and the plaintiff's amended complaint herein in support of said motion, and after hearing Robert B. Honeyman, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had, it is hereby

Ordered that said motion be and the same hereby is in all respects granted, and that judgment be entered herein in favor of the defendant and against the plaintiff, dismissing the plaintiff's amended complaint with costs of this action to be taxed by the Clerk of this Court, and costs of this motion.

Enter.

Peter P. Smith, Justice of the Supreme Court.

Granted July 3, 1935. John N. Harman, Clerk.

[fol. 5] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

STATEMENT FOR JUDGMENT

Costs

Costs before notice of trial	$10.—

Disbursements

Clerk's fees on entering judgment	1.25
Taxation of costs	1.—
Satisfaction piece	.25
Transcript and filing	.60
Sheriff's fees on execution and mileage	2.85
Total	$15.95

CITY & STATE OF NEW YORK,
County of Kings, ss:

James S. Brown, Jr., being duly sworn, deposes and says: That he is an attorney and counselor-at-law and is associated with Anthony F. Tuozzo, attorney for the defendant herein, and has full charge of the above-entitled action and is familiar therewith.

That the plaintiff's complaint herein was duly served on the 10th day of May, 1935. That thereafter the defendant duly served upon the attorney for the plaintiff a notice of motion, dated May 24th, 1935, and returnable May 29th, 1935, to make the said complaint more definite and certain in various respects specified in said notice. That said mo-[fol. 6] tion was on consent adjourned to June 4th, 1935. That thereafter and on the 28th day of May, 1935, the plaintiff served her amended complaint complying with the demands of the aforementioned notice of motion, and the said motion to make the original complaint more definite and certain was therefor withdrawn. That before any answer was interposed herein and on the 17th day of June, 1935, a motion was duly made by the defendant for an order dismissing the plaintiff's said amended complaint with costs on the ground that it appeared on the face thereof that it did not state facts sufficient to constitute a cause of action against the defendant, and said motion was granted and an order was entered thereon directing

that judgment be entered herein in favor of the defendant and against the plaintiff with costs as taxed by the Clerk.

That the disbursements above mentioned have been made or will necessarily be incurred herein and are reasonable in amount.

James S. Brown, Jr.

Sworn to before me this 10th day of July, 1935. Selma J. Spandau, Commissioner of Deeds for the City of New York, Residing in the Borough of Brooklyn. Kings Co. Reg. No. 6017, Kings Co. Clerk's No. 140. N. Y. Co. Reg. No. 2386, N. Y. Co. Clerk's No. 52. Term expires January 23, 1936.

[fol. 7] JUDGMENT

The summons and complaint in this action having been personally served on the defendant on the 10th day of May, 1935, and an amended complaint having been duly served on the 28th day of May, 1935, and a motion having been duly made on the 17th day of June, 1935, to dismiss the said amended complaint upon the ground that it appeared on the face thereof that said amended complaint did not state facts sufficient to constitute a cause of action against the defendant, and an order having been entered on the 2nd day of July, 1935, granting the said motion and directing that judgment be entered herein in favor of the defendant and against the plaintiff dismissing the plaintiff's complaint with costs,

Now on motion of Anthony F. Tuozzo, attorney for the defendant herein, it is

Adjudged, that Herbert G. Hanan, as executor of the last will and testament of Herbert W. Hanan, deceased, the defendant herein, do recover of the plaintiff, Marian S. Honeyman, the sum of Fifteen & 95/100 Dollars costs and disbursements, and that the defendant have execution therefor.

John N. Harman, Clerk.

[fol. 8] In Supreme Court of New York, County of Kings

Notice of Motion for Judgment, etc.

Sir:

Please take notice that, upon the amended complaint in this action, the defendant will move the above named Court at a Special Term, Part I thereof for the hearing of motions to be held at the County Court House in the Borough of Brooklyn, City of New York, on the 17th day of June, 1935, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for judgment, pursuant to Rule 106 of the Rules of Civil Practice, dismissing the plaintiff's said amended complaint on the ground that it appears upon the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action, and for such other and further relief as to the Court may seem just and proper together with the costs of this motion.

Dated June 11th, 1935.

Yours, etc., Anthony F. Tuozzo, Attorney for Defendant, Office & P. O. Address, No. 66 Court Street, Borough of Brooklyn, City of New York.

To Robert B. Honeyman, Esq., Attorney for Plaintiff, 61 Broadway, New York City.

[fol. 9] In Supreme Court of New York, County of Kings

[Title omitted]

Summons

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear,

or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated May 2, 1935.

Robert B. Honeyman, Attorney for Plaintiff, Office and Post Office Address, No. 61 Broadway, Borough of Manhattan, New York City.

[fol. 10] In Supreme Court of New York, County of Kings

Amended Complaint

Plaintiff, for her amended complaint here, alleges, upon information and belief:

I. That on or about the 10th day of January, 1907, John H. Hanan Realty Company, together with John H. Hanan, for the purpose of securing to Louise L. Williams, J. Harvey Ladew and Richard T. Greene, Trustees of the trusts created in and by the Last Will and Testament of Rebecca Ladew, deceased, the sum of One Hundred and Eighteen Thousand Dollars ($118,000), and interest duly made, executed and delivered to them their bond, bearing date January 10th, 1907, and sealed with their seals, wherein and whereby they covenanted to pay to said parties, or their assigns, the said sum of One Hundred and Eighteen Thousand Dollars ($118,000) in two payments, Eighteen Thousand Dollars ($18,000) to be paid on the 10th day of January, 1909, and the balance of One Hundred Thousand Dollars ($100,000) on the 10th day of January, 1912, with interest at the rate of five per cent (5%), payable semi-anually.

II. That as collateral security for the payment of said indebtedness, there was made, executed and delivered a mortgage, bearing even date with said bond, wherein and whereby the said John H. Hanan Realty Company mortgaged to the said Trustees certain premises at the southeast corner of Bleecker and Elizabeth Streets, Borough of [fol. 11] Manhattan, City of New York, more particularly in said mortgage described; that said mortgage was duly recorded in the office of the Register of the County of New York on January 14th, 1907.

III. That thereafter, said bond and mortgage were duly assigned and delivered to John H. Hanan.

IV. That on or about the 9th day of August, 1920, said John H. Hanan, together with Herbert W. Hanan and Addison G. Hanan, for the purpose of securing to Martin Taylor and Leander H. LaChance, as General Guardians of the person and estate of Marian Stewart, and to said Martin Taylor and Leander H. LaChance, as General Guardians of the person and estate of Jean Stewart, the sum of Sixty Thousand Dollars ($60,000) and interest, duly made, executed and delivered to them their joint and several bond, in writing and under seal, bearing date the 9th day of August, 1920, wherein and whereby they covenanted to pay to the said parties, or their assigns, the said sum of Sixty Thousand Dollars ($60,000) on the 17th day of August, 1923, with interest thereon at the rate of six per cent. (6%) per annum, payable semi-annually; that a copy of said bond is hereto annexed and marked Exhibit A.

V. That as collateral security for the payment of said indebtedness, the said John H. Hanan duly assigned the bond and mortgage set forth in Paragraphs I and II hereof to the said Martin Taylor and Leander H. LaChance, as General Guardians of the person and estate of Marian Honeyman, and to said Martin Taylor and Leander H. [fol. 12] LaChance, as General Guardians of the person and estate of Jean Stewart, and delivered the same to Martin Taylor and Leander H. LaChance as General Guardians of the person and estate of Marian Honeyman, and to said Martin Taylor and Leander H. LaChance, as General Guardians of the person and estate of Jean Stewart, and also an extension agreement, in writing, executed by the said John H. Hanan, extending the time for the payment of the said indebtedness evidenced by the said bond, dated January 10, 1907.

VI. That the said John H. Hanan, Herbert W. Hanan and Addison G. Hanan were the officers and owners of the stock of the said John H. Hanan Realty Company.

VII. That thereafter, the bond of the said John H. Hanan, Herbert W. Hanan and Addison G. Hanan, together with the bond and mortgage hereinbefore referred to, were, by instruments of assignment duly recorded, duly

assigned to the plaintiff herein, who is now the owner and holder thereof.

VIII. That thereafter the said John H. Hanan Realty Company failed to comply with the terms of the said bond and mortgage and failed to pay the taxes on the mortgaged premises or the interest on the said bond, and that thereupon, and on or about September 22nd, 1933, the plaintiff began an action to foreclose said mortgage in New York County, and in said action the defendant herein was a party defendant.

[fol. 13] IX. That in said foreclosure action, a motion for summary judgment was granted against said John H. Hanan Realty Company, the defendant therein, and a sale of the mortgaged premises directed; and thereafter, and on or about March 2nd, 1934, said premises, pursuant to said judgment, were duly sold and the proceeds, after the payment of the expenses of sale and taxes, applied upon account of the indebtedness due the plaintiff. That the Referee's deed upon said sale was dated on or about March 5th, 1934, and was recorded on or about March 7th, 1934, in the office of the Register of the County of New York, and that the Referee's report of sale was duly confirmed by the Supreme Court of New York County by order bearing date on or about May 5th, 1934.

X. That a motion was thereafter duly made for a deficiency judgment, but same was denied, and that said foreclosure action, after the sale of the mortgaged premises, was discontinued as to the defendant herein on or about March 20th, 1935, by the filing of a stipulation of discontinuance.

XI. That the deficiency due the plaintiff, as shown by the report of the Referee to sell, duly filed in the office of the Clerk of New York County on the 7th day of March, 1934, was Fifty-eight Thousand Five Hundred Twenty-three and 35/100 Dollars ($58,523.35).

XII. That thereafter the plaintiff herein received from the Receiver, duly appointed to collect the rents and profits of the said premises in said foreclosure action, the sum of [fol. 14] Five Hundred Fifty-four and 01/100 Dollars ($554.01), and that plaintiff has received no other sum upon account of said mortgage indebtedness.

XIII. That there is still due, owing and unpaid to the plaintiff on account of said indebtedness the sum of Fifty-seven Thousand Nine Hundred Sixty-nine and 34/100 Dollars ($57,969.34), with interest thereon from the 7th day of March, 1935.

XIV. That under the terms of the bond, Exhibit A hereto annexed, Herbert W. Hanan, his heirs, executors and administrators, became bound to pay the said plaintiff the amount due on account of the said indebtedness and to hold this plaintiff from and against all loss, damages, costs and expenses, which she might at any time sustain by reason of any default in any of the terms, provisions, covenants or conditions of the said bond and mortgage.

XV. That said Herbert W. Hanan died on or about the 21st day of July, 1933, and that Letters Testamentary were duly issued by the Surrogate of Kings County to Herbert G. Hanan, and that said Herbert G. Hanan duly qualified and is now acting as Executor of the Last Will and Testament of Herbert W. Hanan.

XVI. That the said John H. Hanan and Addison G. Hanan died prior to the failure of the said John H. Hanan Realty Company to comply with the terms of said bond and mortgage, and prior to the bringing of said foreclosure action.

Wherefore, plaintiff demands judgment against the defendant for the sum of Fifty-seven Thousand Nine Hun-
[fol. 15] dred Sixty-nine and 34/100 Dollars ($57,969.34), with interest thereon from the 7th day of March, 1934, besides the costs and disbursements of this action.

Robert B. Honeyman, Attorney for Plaintiff, Office and P. O. Address, No. 61 Broadway, Borough of Manhattan, New York City.

(Verified for plaintiff, May 28, 1935.)

EXHIBIT "A" TO AMENDED COMPLAINT

Know all men re these presents, That we, John H. Hanan, of the Borough of Manhattan, City and State of New York, Herbert W. Hanan, and Addison G. Hanan, both of the

Borough of Brooklyn, County of Kings, City and State of New York, hereinafter designated as the obligors, are held and firmly bound unto Martin Taylor and Leander H. LaChance as General Guardians of the person and Estate of Marian Stewart, an infant, and said Martin Taylor and Leander H. LaChance as General Guardians of the person and Estate of Jean Stewart, an infant, hereinafter designated as the obligee, in the sum of sixty thousand ($60,000) Dollars, lawful money of the United States of America, to be paid to the said obligee, their successors, legal representatives or assigns: For which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors [fol. 16] and administrators jointly and severally firmly by these presents. Sealed with our seals, dated the 9th day of August one thousand nine hundred and twenty.

Whereas, John H. Hanan and John H. Hanan Realty Company have heretofore executed and delivered to Louise L. Williams, J. Harvey Ladew and Richard T. Greene, as Trustees under the will of Rebecca Ladew, deceased, their certain bond or obligation, dated the 10th day of January 1907, conditioned for the payment of the sum of one hundred and eighteen thousand ($118,000) Dollars, as follows: Eighteen thousand dollars thereof on January 10th 1909 and the balance of One hundred thousand dollars thereof on January 10th 1912 with interest thereon at the rate of five per cent. (5%) per annum, which said bond is secured by a certain mortgage, made by said John H. Hanan Realty Company to said obligee named in said bond, bearing even date with said bond, and recorded in the office of the Register of the County of New York on the 14th day of January, 1907, in Liber 231 of Section 2 of mortgages, page 398, and covering certain premises, fully described in said mortgage, situate in the Borough of Manhattan in the City of New York, on the Southeast corner of Elizabeth and Bleecker Streets and more particularly in said mortgage described, and

Whereas the said bond and mortgage by mesne assignments have been assigned to said John H. Hanan and John H. Hanan — by assignment bearing even date herewith is about to assign the said bond and mortgage to the obligee above named; and

[fol. 17] Whereas the said John H. Hanan Realty Company has executed and delivered to the obligee above named

an extension agreement bearing even date herewith wherein and whereby among other things it covenants and agrees to pay the principal sum of sixty thousand dollars ($60,000) being the balance unpaid upon the said bond and mortgage to the said obligee on the 17th day of August, 1923, with interest thereon at the rate of six per cent. (6%) per annum, computed from the 17th day of August, 1920, and to be paid semi-annually on the 17th days of February and August, as in the said extension agreement set forth, and

Whereas, to induce the said obligee to advance the said sum of sixty thousand dollars ($60,000) upon the said bond and mortgage, as aforesaid, and to execute and deliver the said extension agreement the said obligors hath agreed to make, execute and deliver this bond as further and additional security for the payment of the said above-mentioned bond and mortgage.

Now therefore the condition of this obligation is such, that if the parties bound to pay the moneys secured by said bond and mortgage, or the above-bounden obligors, their respective legal representatives or assigns shall well and truly pay, or cause to be paid, to the said obligee, their successors, legal representatives or assigns, the just and full sum of sixty thousand dollars ($60,000), together with all interest thereon, as the same shall become due and payable according to the terms and conditions of the aforesaid bond and mortgage and extension agreement; and if the [fol. 18] said obligors, their respective legal representatives and assigns shall, at all times hereafter, hold, indemnify and save harmless the said obligee, their successors, legal representatives and assigns, from and against all loss, damages, costs, expenses, suits, actions, claims and demands whatsoever, which they may or might otherwise, at any time hereafter, sustain, suffer, be liable to or obliged to pay under or by reason of any default in any of the terms, provisions, covenants or conditions of the aforesaid bond and mortgage or any extension thereof, then this obligation to be void, otherwise to remain in full force and virtue.

John H. Hanan. (L. S.) Herbert W. Hanan. (L. S.) Addison G. Hanan. (L. S.)

Signed, sealed and delivered in the presence of Jean B. Stouvenel.

[fol. 19] State of New York,
County of New York, ss:

On this 9th day of August, in the year one thousand nine hundred and twenty, before me personally came John H. Hanan, Herbert W. Hanan and Addison G. Hanan, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly acknowledged that they executed the same.

Jean B. Stouvenel, Notary Public, Kings Co., New York. Certificate filed in New York County. Kings County Notary #279, Register #1026. New York County Notary #57, Register #1292. Commission Expires March 30, 1921.

(Cancelled stamps to the amount of 50¢.)

In Supreme Court of New York

Opinion by Mr. Justice Smith

Motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint.

[fol. 20] In Supreme Court of New York

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, order appealed from, judgment appealed from, and all the papers upon which the Court below acted in making the order and judgment appealed from and the whole thereof, now on file in the office of the Clerk of Kings County, and the certification thereof by the Clerk of said County is hereby waived.

New York, September 5th, 1935.

Robert B. Honeyman, Attorney for Appellant. Anthony F. Tuozzo, Attorney for Respondent.

[fol. 21] IN SUPREME COURT OF NEW YORK, COUNTY OF KINGS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIR:

Please take notice that pursuant to the order of the Court of Appeals, duly made and entered herein on the 10th day of March, 1936, granting leave to appeal, the appellant above named hereby appeals to the Court of Appeals from the order of the Special Term of the Supreme Court, entered and filed in the Office of the Clerk of the County of Kings on the 3rd day of July, 1935, and from the judgment of the said Special Term, entered and filed in the Office of the Clerk of the County of Kings on the 12th day of July, 1935, and from the order of the Appellate Division of the Supreme Court, in and for the Second Judicial Department, entered on or about the 30th day of December, 1935, affirming the order and judgment of the Special Term, and from the judgment of affirmance, duly entered and filed in the [fol. 22] Office of the Clerk of the County of Kings on the 13th day of January, 1936, and from each and every part of said orders and judgments.

Dated, New York, March 13th, 1936.

Yours, etc., Robert B. Honeyman, Attorney for Appellant, No. 61 Broadway, Borough of Manhattan, New York City.

To Anthony F. Tuozzo, Esq., Attorney for Respondent, 66 Court Street, Borough of Brooklyn, New York City.

[fol. 23] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. Edward Lazansky, Presiding Justice; Hon. J. Addison Young, Hon. William F. Hagarty, Hon. William B. Carswell, Hon. John B. Johnston, Justices.

MARIAN S. HONEYMAN, Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased, Respondent

ORDER OF AFFIRMANCE—December 30, 1935

The above-named Marian S. Honeyman, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court, entered in the office of the Clerk of the County of Kings on the 3rd day of July, 1935, granting defendant's motion to dismiss the amended complaint, and from the judgment entered thereon in said Clerk's office on the 12th day of July, 1935, herein, and the said appeal having been argued [fol. 24] by Mr. Robert B. Honeyman, of counsel for the appellant, and submitted by Mr. Anthony F. Tuozzo, of counsel for the respondent, and due deliberation having been had thereon,

It is ordered that the order and judgment so appealed from be, and the same hereby are, unanimously affirmed, with $10 costs and disbursements.

Enter.

Wm. B. Carswell, Associate Justice.

IN SUPREME COURT OF NEW YORK, KINGS COUNTY

MARIAN S. HONEYMAN, Plaintiff,

against

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased, Defendant

JUDGMENT OF AFFIRMANCE APPEALED FROM

The above-named Marian S. Honeyman, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from the Judgment entered in the office of [fol. 25] the Clerk of the County of Kings on the 12th day of July, 1935, dismissing the amended complaint herein, and the said appeal having been heard, and the said Appellate

Division having ordered and adjudged that the said judgment so appealed from be unanimously affirmed with $10 costs and disbursements, and a certified copy of the order of the Appellate Division having been duly filed together with the record on said appeal in the office of the Clerk of the County of Kings, and said costs having been duly taxed,

It is, on motion of Anthony F. Tuozzo, attorney for the defendant,

Adjudged that the judgment so appealed from be and the same is in all things unanimously affirmed, and that the defendant of 885 Park Avenue, New York City, recover of the plaintiff the sum of $34.05, costs of said appeal as taxed, and that he have execution therefor.

Dated January 13th, 1936.

John N. Harman, Clerk.

[fol. 26] In Court of Appeals of New York

[Title omitted]

Order Granting Leave to Appeal—March 10, 1936

A motion for leave to appeal to the Court of Appeals in the above case having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A Copy.

John Ludden, Deputy Clerk. (Seal.)

[fol. 27] In Supreme Court of New York

Affidavit of No Opinion by Appellate Division

State of New York,
County of New York, ss:

Robert B. Honeyman, being duly sworn, deposes and says that he is the attorney for plaintiff-appellant in the above-entitled action.

That no written opinion was rendered by any of the Justices of the Supreme Court, Appellate Division, Second Department, in affirming the judgment appealed from herein.

Robert B. Honeyman.

Sworn to before me this 24th day of March, 1936. M. K. Lotterer, Notary Public. N. Y. Co. Clerks No. 201. N. Y. Co. Register's No. 7L211. Kings County Clerk's No. 37, Register's No. 7208. Commission Expires March 30th, 1937. Certificate filed in New York County.

[fol. 28] In Supreme Court of New York

Stipulation Waiving Certification on Appeal to Court of Appeals

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by the attorneys for the respective parties that the foregoing are true copies of the notice of appeal to the Court of Appeals, the order of affirmance herein, the judgment of affirmance appealed from, the order granting leave to appeal and the record on appeal as filed with the Clerk of the Appellate Division, Second Department, all of which are now on file in the office of the Clerk of the County of Kings; and certification thereof by said Clerk is hereby waived.

Dated, New York, March 25, 1936.

Robert B. Honeyman, Attorney for Plaintiff-Appellant. Anthony F. Tuozzo, Attorney for Defendant-Respondent.

[fol. 29] In Supreme Court of New York, County of Kings

[Title omitted]

Order on Remittitur—June 11, 1936

The above named plaintiff, pursuant to the order of the Court of Appeals duly made and entered herein on the 10th day of March, 1936 granting leave to appeal, having appealed to the Court of Appeals from the order of the

Special Term of this Court entered and filed in the office of the Clerk of the County of Kings on the 3rd day of July, 1935, and from the judgment of the said Special Term entered and filed in the office of the Clerk of the County of Kings on the 12th day of July, 1935, and from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered on or about the 30th day of December, 1935 affirming the said order and judgment of the said Special Term, and from the judgment of affirmance duly entered and filed in the office of the Clerk of the County of Kings on the 13th day of January, 1936, and from each and every part of said orders and judgments, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from herein be affirmed and judgment entered for the defendant [fol. 30] with costs, and having ordered and adjudged that the record of said appeal and the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law, and the remittitur from the Court of Appeals having been heretofore duly filed in the office of the Clerk of the County of Kings;

Now on motion of Anthony F. Tuozzo, attorney for the defendant herein, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of this Court.

Enter.

C. C. L., J. S. C.

Granted June 11, 1936. John N. Harman, Clerk.

[fol. 30½] Sir:

Please take notice that the within is a true copy of an Order this day made and entered herein in the office of the Clerk of Kings County.

Dated, N. Y., June 12th, 1936.

Yours, etc., Anthony F. Tuozzo, Attorney for Defendant, Office and Post Office Address, 66 Court Street, Borough of Brooklyn, New York City.

To Robert B. Honeyman, Esq., Attorney for Plaintiff.

Due and timely service of a copy of the within Rec'd June 17/36, is hereby admitted.

Dated, N. Y., —— —, 193-.

—— —— Attorney for ——.

[fol. 31] In Supreme Court of New York, Kings County

Marian S. Honeyman, Plaintiff,

against

Herbert G. Hanan, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased, Defendant

Judgment on Remittitur

A judgment in this action in favor of the defendant and against the plaintiff herein having been entered in this court on the 12th day of July, 1935; and the plaintiff having appealed from said judgment to the Appellate Division of this Court for the Second Department, and the said judgment in favor of the defendant having been affirmed by this Court at said Appellate Division, and judgment having been rendered thereon on the 13th day of January, 1936, and that defendant recover against the plaintiff the sum of $34.05, costs of said appeal; and the plaintiff having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein on the 12th day of June, 1936, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs, and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law; and this Court having by an order duly entered herein on the 13 day of June, 1936, ordered that said judgment be made the judgment of this Court, and the defendant's costs having been duly taxed at the sum of $139.02/100 Dollars;

Now on motion of Anthony F. Tuozzo, attorney for the defendant, it is

[fol. 32] Adjudged that the said judgment of the Appellate Division be and the same is hereby in all things affirmed with costs, and that the defendant of 885 Park Ave., N. Y. C., recover of the plaintiff the sum of $139.02/100, costs as taxed, and that he have execution therefor.

Dated June 19, 1936.

John N. Harman, Clerk.

[fol. 32½] SIR:

Please take notice that the within is a true copy of a Judgment this day made and entered herein in the office of the Clerk of Kings County.

Dated, N. Y., June 19th, 1936.

Yours, etc., Anthony F. Tuozzo, Attorney for Defendant, Office and Post Office Address, 66 Court Street, Borough of Brooklyn, New York City.

To Robert B. Honeyman, Esq., Attorney for Plaintiff.

[fol. 33] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated by counsel for both sides in the above cause that the Clerk, in making up the transcript, shall follow the papers and records as shown in the transcript on file in the Court of Appeals and the Supreme Court of the State of New York without omission or addition.

Dated Sept. 2, 1936.

Robt. B. Honeyman,. Attorney for Appellant. Anthony F. Tuozzo, Attorney for Appellee.

[fol. 34] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Marian S. Honeyman, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York entered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by

the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment dated the 19th day of June, 1936, of the Supreme Court of the State of New York, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, in the County of Kings, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of said Court, a true copy of the material parts of the record herein, which shall be designated by a præcipe or stipulation of the [fol. 35] parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It is further Ordered that the said Appellant shall give a good and sufficient bond, in the sum of Five Hundred Dollars, that said appellant shall prosecute said appeal to effect and answer all costs, if she fails to make her plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceeds in this cause until the final disposition of this cause by the Supreme Court of the United States.

September 2, 1936.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 36] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your Petitioner, Marian S. Honeyman, respectfully shows:

Your petitioner is the appellant in the above entitled action.

This action is brought to establish the liability of the decedent's estate for the balance due upon a loan evidenced by a written obligation. The summons and complaint were

served May 10, 1935, and an amended complaint was served May 28, 1935. No answer was served and no issue of fact was presented.

The amended complaint sets forth a cause of action upon a bond or instrument in writing evidencing a loan or advance of Sixty Thousand Dollars ($60,000.) made August 17, 1920 by petitioner's guardians to the respondent's testator and his father, John H. Hanan, and his brother, Addison G. Hanan. This written instrument (Record, Ex. A, pp. 15-19) is the joint and several obligation of the obligors to pay the said sum of Sixty Thousand Dollars ($60,000.) with [fol. 37] interest. As security for the loan, the respondent's testator and his co-obligors assigned to petitioner's guardians a bond of the John H. Hanan Realty Co. executed January 14, 1907, together with a mortgage on certain real estate in New York City and title to which had become vested in respondent's testator and his co-obligors.

The 1920 obligation sued upon in this action recites that it is given to induce the obligee to advance the said sum of Sixty Thousand Dollars ($60,000.) upon the 1907 bond and mortgage of the John H. Hanan Realty Co. and as further and additional security for the payment of the 1907 bond and mortgage (Fol. 50, Record p. 17).

John H. Hanan and Addison G. Hanan died prior to 1933. In 1933 Herbert W. Hanan, respondent's testator, died. Default existing in the payment of interest and taxes on the property mortgaged to secure the Realty Company's 1907 bond, foreclosure proceedings were brought, and upon a judgment of foreclosure and sale against the Realty Company the mortgaged real estate was sold. After application of the proceeds of sale to the amount due for principal, interest, taxes and expenses, there was a deficiency in the sum of $57,969.34. Your petitioner made application for a deficiency judgment against the John H. Hanan Realty Co., which was denied.

Your petitioner, having exhausted her remedies as against the collateral, brought this action upon the 1920 bond against the respondent to establish her claim for the balance due her upon the loan against the Estate of respondent's decedent, Herbert W. Hanan.

As before stated, no issue was joined. The respondent moved the Court at Special Term for judgment dismissing the amended complaint upon the ground that it did not

[fol. 38] state facts sufficient to constitute a cause of action. The Court granted the motion in the following memorandum of decision:

"Motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint",

and judgment of dismissal was entered with costs. An appeal was taken to the Appellate Division, Second Department, and the said judgment of the Special Term was affirmed with costs, without any opinion whatever. The Court of Appeals granted the motion for leave to appeal to the Court of Appeals, and the appeal was argued and judgment of the lower Court affirmed, with costs, without any opinion. A motion was made to the Court of Appeals for an order amending its remittitur and the said motion was granted. An order was thereafter entered amending the remittitur by adding the words:

"A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States."

That thereafter, the remittitur of this Court was returned to the Clerk of the Court of Appeals of the State of New York and was duly amended in accordance with the order above referred to. Thereafter, and on or about the 19th day of June, 1936, judgment was entered in the Supreme Court upon the remittitur as amended by the Court of Appeals.

In accordance with Section 237 of the Judicial Code and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows that this [fol. 39] case is one in which a review can be had in the Supreme Court of the United States as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assign-

ment of errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by the Rules of the said Supreme Court.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest Court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Kings, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated, August 24th, 1936.

Robert B. Honeyman, Attorney for Petitioner.

[fol. 40] Citation, in usual form, omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record and proceedings in this case:

1. The State Court erred in holding that Chapter 794 of the Laws of 1933 of the State of New York was a bar to appellant's action to establish her claim against the decedent's estate for the sum remaining unpaid upon a loan to decedent made in 1920, evidenced by a written obligation to pay, as security for which there was pledged and assigned to appellant a bond and mortgage executed by another in 1907, and which had been foreclosed by appel-

lant after the enactment and taking effect of said legislative act for non-payment of interest and taxes, and the proceeds of sale duly credited upon account of the loan.

2. The State Court erred in refusing to hold, as contended by the appellant, that the Legislature of the State of New York may not delegate to the Court the power to fix the value of real estate or a mortgage thereon pledged as security for a loan and to limit the contract right of the [fol. 42] appellant creditor to recover upon said loan to the difference between the amount of the loan and the value of the security as fixed by the Court.

3. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 violates the Federal Constitution by requiring that mortgagees are required to accept the proceeds of the sale of mortgaged property or the property itself, if bid in by the mortgagee at the amount determined by the State Court to be market value of the property, as a credit or offset against the mortgage debt.

4. The State Court erred in holding that Chapter 794 of the Laws of 1933 applied to and barred appellant's right to maintain this action to recover the balance unpaid upon the loan evidenced by the instrument, Exhibit A, attached to the complaint, for the reason that the indebtedness of the decedent was a primary obligation to repay moneys loaned to decedent and not a guaranty of a mortgage upon real property, executed simultaneously therewith.

5. The State Court erred in refusing to hold that the Legislature may not limit or destroy appellant's claim for the unpaid balance of the loan made to decedent by requiring fictitious credits thereupon, or the allowance of appellant's offsets.

6. The State Court erred in refusing to hold that the Act of the Legislature of the State of New York, Chapter 794 of the Laws of 1933, is repugnant to Article 1, Section 10, of the Constitution of the United States in that it impairs appellant's contract rights, denies the enforcement thereof, and permits the repudiation of decedent's debt, and in that it destroy's appellant's rights and property without due process and without compensation.

[fol. 43] 7. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 of the State of New

York violates the Constitution of the United States in that it limits and abrogates contract rights in the matter of deficiency judgments and actions on bonds or other written obligations without regard to the necessities or the protection of the creditor or the ability of the debtor to pay.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said judgment of the State Court of the State of New York, dated the 19th day of June, 1936, in the above entitled cause, be reversed, and judgment entered in favor of this appellant.

Dated, September 2, 1936.

Robert B. Honeyman, Attorney for Appellant.

[fols. 44-45] Bond on appeal for $500.00, approved and filed September 5, 1936, omitted in printing.

[fol. 46] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed September 15, 1936

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated, New York, September 11th, 1936.

Robt. B. Honeyman, Solicitor for the Appellant.

[fol. 46½] STATE OF NEW YORK,
County of New York, ss:

Burton G. Rudnick, being duly sworn, deposes and says, that he is over the age of twenty-one; that on the 11th day of September, 1936, he served the within Statement of Points and Designation of Parts of Record to be Printed, on Anthony F. Tuozza, the attorney for the Appellee herein, by delivering to and leaving with the person in

charge of said attorney's office a true copy thereof, at 66 Court Street, Brooklyn, N. Y.

Burton G. Rudnick.

Subscribed and sworn to before me, this 11th day of September, 1936. M. K. Lotterer, Notary Public. N. Y. Co. Clerk's No. 201. N. Y. Co. Register's No. 7L241. Kings County Clerk's No. 37 Register's No. 7208. Commission Expires March 30th, 1937.

[fol. 47] [File endorsement omitted.]

[fol. 48] Service of 3 copies of the within Case on Appeal admitted this 25th day of March, 1936.

Anthony F. Tuozza, Atty. for Respondent.

Endorsed on cover: Enter Robert B. Honeyman. File No. 40,910. New York, Supreme Court. Term No. 370. Marian S. Honeyman, appellant, vs. Herbert G. Hanan, as Executor of the last will and testament of Herbert W. Hanan, deceased. Filed September 15, 1936. Term No. 370, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED,

Appellee.

STATEMENT AS TO JURISDICTION.

The appellant contends that the Supreme Court of the United States has jurisdiction upon an appeal to review the judgment of the Supreme Court of the State of New York in question.

This appeal comes directly within the provision of Section 237 of the Federal Judicial Code (28 U. S. C. #344). It is a final judgment of the highest Court of the State of New York in which a decision in the suit could be had. There is drawn in question the validity of a statute of the State of New York and the decision of the Court of Appeals of the State of New York is in favor of its validity. The

Court of Appeals of the State of New York, by its order and its remittitur, has stated:

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED,

Appellee.

And now comes the appellant in the above entitled cause and moves the Court for leave to amend her statement as to jurisdiction as will appear from the amended statement herewith filed; that said amendments are material and necessary to make said statement to conform to the requirements of Rule 12 of this Court as amended to take effect July 1, 1936; that matters incorporated in the amended statement were inadvertently not incorporated in the original statement by reason of the absence of appellant's counsel from his office from June 13th to September 1st last;

Wherefore, appellant prays that the amendment be allowed and considered as part of the statement as to jurisdiction in this cause.

September 16th, 1936.

ROBT. B. HONEYMAN,
Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED,

Appellee.

STATEMENT AS TO JURISDICTION.

The appellant contends that the Supreme Court of the United States has jurisdiction upon an appeal to review the judgment of the Supreme Court of the State of New York in question.

This appeal comes directly within the provision of Section 237 of the Federal Judicial Code (28 U. S. C. #344). It is a final judgment of the highest Court of the State of New York in which a decision in the suit could be had. There is drawn in question the validity of a Statute of the State of New York and the decision of the Court of Appeals of the State of New York is in favor of its validity.

The New York Statute, Chapter 794 of the Laws of 1933, reads as follows:

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mort-

gages on real property and actions to recover judgments on bonds secured by mortgages on real property.

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, and the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§ 2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD.—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other

manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

"§ 1083-b. JUDGMENTS IN ACTIONS ON BONDS.—In any action pending at the time this action as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and end encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been enacted but the amount of any money judgment recovered as provided

in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two."

By amendment, the period of emergency has been extended to July 1, 1937 (Laws of 1934, Chapter 277; Laws of 1935, Chapter 2; Laws of 1936, Chapter 87).

The judgment sought to be reviewed is that of the Court of Appeals of the State of New York, bearing date June 19, 1936, affirming the judgment of the Appellate Division of the Second Department, dated January 13, 1936, which affirmed the judgment of the Special Term, Kings County, dated July 12, 1935. The application for an appeal was presented to the Presiding Judge of the Court of Appeals of the State of New York on September 2, 1926.

This action was brought to establish the petitioner's claim against the decedent's estate. No answer was served and no issue of fact is presented.

The amended complaint sets forth a cause of action upon a bond or instrument in writing evidencing a loan or advance of sixty thousand dollars ($60,000) made August 17,

1920, by petitioner's guardians to the respondent's testator and his father, John H. Hanan, and his brother, Addison G. Hanan. This written instrument, attached to the complaint, Exhibit A, is the joint and several obligation of the obligors to pay the said sum of sixty thousand dollars ($60,000) and interest. As security for the loan the respondent's testator and his co-obligors assigned to petitioner's guardians a bond of the John H. Hanan Realty Co. executed January 14, 1907, together with a mortgage on certain real estate in New York City and title to which had become vested in respondent's testator and his co-obligors.

The 1920 obligation sued upon in his action recites that it is given to induce the obligee to advance the said sum of sixty thousand dollars ($60,000) upon the 1907 bond and mortgage to John H. Hanan Realty Co. and as further and additional security for the payment of the 1907 bond and mortgage.

John H. Hanan and Addison G. Hanan died prior to 1933. In 1933 Herbert W. Hanan, respondent's testator, died, and payment of interest ceased. Default existing in the payment of interest and taxes on the property mortgaged to secure the Realty Company's 1907 bond, foreclosure proceedings were brought, and upon a judgment of foreclosure and sale against the Realty Company the mortgaged real estate was sold. After application of the proceeds of sale to the amount due for principal, interest, taxes and expenses, there was a deficiency in the sum of $57,969.34. Your petitioner made application for a deficiency judgment against the John H. Hanan Realty Co., which was denied.

Your petitioner, having exhausted her remedies as against the collateral, brought this action upon the 1920 bond against the respondent to establish her claim for the

balance due her upon the loan against the estate of respondent's decedent, Herbert W. Hanan.

As before stated, no issue was joined, but the foregoing facts appear from the complaint. The respondent moved the Court at Special Term for judgment dismissing the amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court granted the motion in the following memorandum of decision:

> "Motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint."

and judgment of dismissal was entered with costs. An appeal was taken to the Apellate Division, Second Department, and the said judgment of the Special Term was affirmed, with costs, without any opinion whatever. The Court of Appeals granted the motion for leave to appeal to the Court of Appeals, and the appeal was argued and judgment of the lower court affirmed, with costs, without any opinion. A motion was made to the Court of Appeals for an order amending its remittitur and the said motion was granted. An order was thereafter entered amending the remittitur by adding the words:

> "A question under the Federal Constitution was presented and necessarily passed upon by this Court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws did not violate said provision of article 1, section 10, of the Constitution of the United States."

The question of the constitutionality of the Mortgage Moratorium Laws of the State of New York was presented

to the Special Term and to the Appellate Division, as well as to the Court of Appeals, by argument and written briefs. The theory of the decision appealed from is obviously that where the court refuses a deficiency judgment in foreclosure, under the act in question, the security must be deemed to be of equal value to the debt and its sale to be in full satisfaction of the debt, regardless of the actual price for which the same was sold. As a result, appellant is without any remedy or means of establishing or collecting her claim against decedent's estate for the balance due her upon her undisputed claim for moneys loaned, upon the theory that Chapter 794 of the Laws of 1933, the sale of the security satisfied the debt and barred action upon the primary obligation here sued upon. The question presented is a substantial one and involves the right of the New York Legislature to destroy appellant's contract rights without compensation therefor.

The Supreme Court of the United States has jurisdiction to review the decision appealed from. In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, this jurisdiction was exercised under similar circumstances.

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Office - Supreme Court,
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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,
Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

Statement.

This action is upon a written instrument evidencing a loan made by appellant's guardians to appellee's testator, and others, in *1920,* secured by the pledge of a bond and mortgage made and executed in *1907* by the John H. Hanan Realty Company owned by the borrowers upon a loft building at the corner of Bleecker and Elizabeth Streets, New York City.

Upon default in payment of interest and appellee's testator having died, appellant foreclosed upon her security and sold the mortgaged property and exhausted her remedies upon

the bond of the Hanan Company, as required by the law of New York, and then brought this action to establish her claim against decedent's estate.

This action is not a foreclosure action, nor is it an action to recover upon the mortgage debt.

The appellee did not answer the complaint or the amended complaint and no issue exists.

Upon motion, at Special Term, the complaint was dismissed with costs, the Court handing down a memorandum as follows:

> "A motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint."

Upon appeal, the judgment was affirmed by the Appellate Division without memorandum or opinion, and likewise was affirmed by the Court of Appeals without memorandum or opinion. The remittitur of the Court of Appeals was amended upon motion to read as follows:

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States."

Argument.

Appellee argues (p. 9 of his brief) that it is "Chapter 793 of the Laws of 1933, the constitutionality of which is not questioned, which precluded the plaintiff's action and made her complaint dismissable on motion."

An examination of Chapter 793, set forth in the appendix to appellee's brief, discloses that it deals with bonds and mortgages that are past due but *not* in default as to interest

and taxes and foreclosure is prohibited or stayed so long as no such default exists. Our action to foreclose was not prohibited or stayed, and we were not affected in the least by any provision of Chapter 793.

Chapter 794 of the Laws of 1933—a separate act of the legislature—was held to bar our action on the obligation on which this action is brought. This chapter adds §1083-a and §1083-b to the Civil Practice Act, and is set forth in full in the appendix annexed hereto.

Section 1083-a limits deficiency judgments in foreclosure.

Section 1083-b limits judgment in an action other than to foreclose.

The amended complaint alleges in substance that in our action to foreclose our collateral security we exhausted our remedy against the John H. Hanan Realty Company, obligor on the 1907 bond, by asking for a deficiency judgment and that the application was denied. The New York courts have now held that this denial of deficiency judgment is a bar to the maintenance of this action. It is obvious then that Chapter 793 can have no direct application to the questions raised in this action and the certificate of the Court of Appeals that

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States,"

is a correct statement.

Appellee argues that regardless of the constitutionality of Chapter 794 the complaint would still have been dismissable because of §1078 of the Civil Practice Act.

That section of the Civil Practice Act relates solely to a mortgage debt and does not refer in any way to primary or unconditional obligations for which a bond and mortgage

was given as security, as is the case at bar. Here, the mortgage debt was that of the John H. Hanan Realty Company and not the loan made by appellant to the appellee's testator.

Appellee likewise argues that by pursuing our action to foreclose we had the advantage of Chapter 794 of the Laws of 1933, and that we may not now question the constitutionality of that act.

We have never claimed, and do not now claim that the legislature may not dictate procedure and may not modify procedure as well. The appellant obtained no advantages whatever from Chapter 794 of the Laws of 1933 in her foreclosure action. That act contains only limitations—not advantages to mortgagees. She had the right to foreclose long before Chapter 794 was passed, and she has always had the right to apply for a deficiency judgment, a right that could not be destroyed by the legislature.

So far as the mortgage debt of the Realty Company was concerned, it was useless for the appellant to proceed further. All that is of concern here is that appellee may not say that appellant has not first exhausted her legal remedies, whether constitutional or not.

Chapter 794 of the Act of 1933, passed by the Legislature of the State of New York, is clearly unconstitutional as applied to the facts in the case at bar.

At the time appellant loaned money to appellee's testator and took his unconditional promise to repay the same, together with a bond and mortgage of the Hanan Realty Company made and executed thirteen years before, as security, she relied upon the existing laws of the State of New York.

In *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, this Court said (p. 60):

> "To know the obligation of a contract we look to the laws in force at its making (citing cases). * * * Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression.

> Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433. * * * A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor."

In *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, this Court said (pp. 433-434):

> "In *Home Bldg. & L. Asso.* v. *Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy the *repudiation of debts or the destruction of contracts or the denial of means to enforce them.*' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency.* Accordingly, in the Blaisdell case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*
>
> "'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied, to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, this Court, referring to its decision in *W. B. Worthen Co.* v. *Kavanaugh,* said (p. 581):

> "But the statutory command that the mortgagor should not lose his property on default had always

> rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full."

The New York legislature has gone much further than merely prohibiting foreclosure so long as interest and taxes are paid during a temporary period of emergency.

The New York Court of Appeals say in *City Bank Farmers Trust Co.* v. *Ardlea*, 267 N. Y. 225, that

> "Sections 1083-a and 1083-b were enacted at the same time as sections 1077-a and 1077-b and as part of the general purpose of affording relief to distressed debtors. * * * Section 1083-a prevents a deficiency judgment when the court finds that the fair market value of the premises covered by the mortgage equals or exceeds the amount specified in the judgment and prior liens. Section 1083-b affords the same protection, in actions against makers or guarantors of bonds, 'against any person or corporation directly or indirectly or contingently liable therefor.'"

If the mortgagor should not pay any interest or taxes for any reason whatsoever, certainly the mortgagee should do something for his own protection. The necessities of the mortgagee may be fully as great, if not greater, than the mortgagor. If both mortgagee and mortgagor do nothing the debt due the mortgagee will increase at an alarming rate. The mortgagee *must* do something to save himself the utter loss of his security and his entire debt. If he proceeds to foreclosure and sale—and there is nothing to prevent—he obtains whatever the property brings or the property itself, which he may not want. The property may have become largely depreciated and may not earn enough to pay taxes, which is the case at bar.

Now, the New York statute says (§1083-a) that

> "No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided."

The statute then states that within ninety days after the date of sale a motion may be made for a deficiency judgment and the Court shall determine "the fair and reasonable market value of the mortgaged premises as of the date of sale" and shall limit the deficiency judgment accordingly, and adds:

> "If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Under §1083-b, if the mortgagee does not foreclose but sues on the bond or any guaranty or indemnity, the value of the property to be determined by the Court may be offset or credited against the amount due the mortgagee. In other words, a penalty is imposed upon a mortgagee who dares to sell in foreclosure during the emergency when in all conscience he *must* do something to protect himself against a defaulting debtor and the penalty is a loss of his contract rights, appellant has been deprived of his contract rights—not *temporarily,* but *absolutely and forever.*

The mortgagor guarantor is not required to come in and show that he is a "distressed" debtor.

The Court of Appeals in *Sliosberg* v. *New York Life Ins. Co.,* 244 N. Y. 482, at 498, wrote:

> "That a debtor has lost the wherewithal to pay is no defense, whether its loss is attributable to simple robbery or to piracy which has been coated white by legislation."

He is not required to trustee his property, as security, but is given relief which is neither "temporary or on condition."

As this Court said in *Worthen* v. *Thomas* (*supra*):

> "The act contains no limitation as to time, amount, circumstances, or need."

In *Murray* v. *Marshall*, 94 N. Y. 611, the owner and mortgagor of property conveyed, subject to the mortgage, and the owner of the bond and mortgage extended the time to pay to the vendee of the property. The Court said:

> "When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation." (Cited and approved in *Commercial Casualty Ins. Co.* v. *Roman*, Jan. 8, 1926, 269 N. Y. 451.)

We frequently read that the delay in reaching cases for trial amounts to a denial of justice. (*Matter of Raymond* v. *Davis*, 248 N. Y., at p. 72.)

If a creditor's act in extending time, thereby imposing a new risk upon a surety, is a modification or destruction of a contract right, why is not an act of the legislature extending time, imposing new risks, limiting deficiencies and giving courts power to satisfy debts, equally an impairment of contract rights?

Where, in appellant's contract with the appellee's testator, does she agree that the Court may determine the value of the property and that the debt is to be paid in full or to the extent that the Court may direct? The guarantor may be good to-day, hopelessly involved financially to-morrow. Many mortgages are sold upon the faith of the guaranty. If a debtor is really distressed he has a remedy by bank-

ruptcy, but the legislature of the State of New York has no power to give to a distressed debtor the benefits of the Bankruptcy Act.

The New York Moratorium Laws have been extended from year to year until now they run to July, 1937, with a provision, where interest and taxes are paid, that principal sums will not become due for another year; that is to say, July, 1938. May a legislature indefinitely prolong an intolerable mortgage situation which has been created by the act of the legislature itself?

This Court certainly has jurisdiction—and should exercise it.

The motion to dismiss must be denied.

Respectfully submitted,

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APPENDIX.

The New York Statute, Chapter 794 of the Laws of 1933, reads as follows:

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mortgages on real property and actions to recover judgments on bonds secured by mortgages on real property.

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, and the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§ 2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD.—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to

enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale, regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

"§ 1083-b. JUDGMENTS IN ACTIONS ON BONDS.—In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured solely by a mortgage on real property and which originated simultaneously with such mortgage and which is secured by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been enacted but the amount of any money judgment recovered as provided in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two.

"5. This act shall take effect immediately."

Supreme Court of the United States

October Term, 1916.

No. 270.

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of HERBERT W. HANAN, deceased,

Appellee.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,
Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan,
Respondent.

BRIEF FOR APPELLANT.

Jurisdiction.

Appellant filed a statement as to the jurisdiction of this Court as part of the papers presented to the Chief Judge of the Court of Appeals upon the allowance of the appeal. Subsequently leave was asked to amend this statement and upon the application for such leave appellee filed a motion for a dismissal. Upon consideration, this Court entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

Statement of the Case.

This action is upon a written instrument or bond evidencing a loan made by appellant's guardians to appellee's testator and others in 1920. As security for this instrument, the borrowers pledged a bond and mortgage owned by them, executed and delivered in 1907 by the John H. Hanan Realty Company, the mortgage being upon a loft building located at the corner of Bleecker and Elizabeth Streets, New York City. Upon default in the payment of interest on the loan and appellee's testator having died, and the Hanan Realty Company having defaulted in the payment of interest and taxes upon its bond and mortgage, the appellant foreclosed her security and sold the mortgaged property at a foreclosure sale and exhausted her remedies upon the security as required by the laws of the State of New York. She then brought this action to establish her claim against the appellee's testator's estate. This action is not a foreclosure action nor is it an action to recover upon the mortgage debt or any part thereof.

The appellee did not answer the complaint or the amended complaint and no issue of fact exists.

Upon motion at Special Term the complaint was dismissed, the Court merely handing down a memorandum as follows (not reported in the Official Reports; see New York Law Journal, June 26, 1935):

> "Motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint" (Record, p. 15).

Final judgment was entered upon this decision dismissing the complaint with costs (Record, p. 7).

Upon appeal to the Appellate Division, the judgment was affirmed without memorandum or opinion (246 App. Div. 781; Record, p. 17), and upon a further appeal to the Court of Appeals the judgment was affirmed, likewise without memorandum or opinion (271 N. Y. 564; Record, p. 21).

On motion, the remittitur of the Court of Appeals was amended so that the same contained the following statement (Record, p. 3):

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impairs the obligations of contracts, and thus violates article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States" (271 N. Y. 662).

Prior to the enactment of Chapter 794 above referred to, a referee appointed to sell property under a judgment of foreclosure made and filed his report showing his proceedings and the sale and the disposition of the proceeds and the Clerk of the Court entered a deficiency judgment for the difference between the amount due and the net amount realized upon the sale (§1083, Civil Practice Act); and in any action upon a bond, plaintiff was entitled to judgment for any sum due and unpaid.

Chapter 794 of the Laws of 1933 (which is printed in full as Appendix A hereto) added two new sections to the Civil Practice Act, 1083-a and 1083-b.

Section 1083-a provides that after sale in foreclosure, on motion, the Court

> "shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property, whichever shall be the higher. If no motion

> for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Section 1083-b provides that in an action upon a bond, other than an action to foreclose a mortgage, secured by a mortgage on real estate, "any person directly or indirectly or contingently liable therefor" may "set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances." (By Chapter 277, Laws of 1934, and Chapter 2, Laws of 1935, the period of the emergency has been extended to July 1, 1936, and has been further extended to July 1, 1937.)

This action being, as stated, upon a bond, which was secured by a bond and mortgage, the New York Courts have held that §1083-b is applicable and that appellant may not recover. The only possible theory to support the decision is that she has alleged in her complaint that a deficiency judgment was denied her in the foreclosure proceeding, and this is construed to be equivalent to an allegation that the foreclosed property was of a value equal to the debt; that the mortgage was security for the debt here sued upon, and that appellee is entitled to credit for payment in full regardless of the amount for which the property was actually sold. There is no other provision of the Mortgage Moratorium Laws applicable, and *there is no other possible interpretation of the decisions of the New York Courts.*

Assignment of Errors Relied Upon.

1. The State Court erred in holding that Chapter 794 of the Laws of 1935 of the State of New York was a bar to appellant's action to establish her claim against the decedent's estate for the sum remaining unpaid upon a loan to decedent made in 1920, evidenced by a written obligation to pay, as security for which there was pledged and assigned to appellant a bond and mortgage executed by another in 1907, and which had been foreclosed by appellant after the

enactment and taking effect of said legislative act for non-payment of interest and taxes, and the proceeds of sale duly credited upon account of the loan.

3. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 violates the Federal Constitution by requiring that mortgagees are required to accept the proceeds of the sale of mortgaged property or the property itself, if bid in by the mortgagee, at the amount determined by the State Court to be market value of the property, as a credit or offset against the mortgage debt.

6. The State Court erred in refusing to hold that the Act of the Legislature of the State of New York, Chapter 794 of the Laws of 1933, is repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs appellant's contract rights, denies the enforcement thereof, and permits the repudiation of decedent's debt, and in that it destroys appellant's rights and property without due process and without compensation.

7. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 of the State of New York violates the Constitution of the United States, in that it limits and abrogates contract rights in the matter of deficiency judgments and actions on bonds or other written obligations without regard to the necessities or the protection of the creditor or the ability of the debtor to pay.

Summary of Argument.

Appellant contends that—

POINT I. The instrument sued upon is a primary obligation and is not a mortgage debt or a guarantee of a mortgage debt.

The New York Courts have, nevertheless, construed the instrument as one subject to the provisions of §1083-b of the Civil Practice Act.

POINT II. The appellant's contract has been materially impaired if Chapter 794, Laws of 1933, is applicable thereto.

At the time the contract was made it was subject to the existing law which entered into and became a part thereof. The Act complained of requires appellant in any action she may bring to credit the debtor with the "fair market value" of the mortgaged property, whether it be sold or not, or whatever it may bring at a sale.

POINT III. The provisions of Chapter 794, Laws of 1933, impair the obligations of appellant's contract and thus violate the constitutional prohibition upon such legislation.

The Supreme Court of the United States has consistently held over many years that the vacation or serious modification of pre-existing law as it affects a contract is repugnant to Section 10, Article 1, of the Constitution, and practically all of the State Courts that have had occasion to pass on similar laws have similarly decided, save only the Courts of the State of New York.

ARGUMENT.

POINT I.

The instrument sued upon is a primary obligation and is not a mortgage debt or a guarantee of a mortgage debt.

The loan made by appellant's guardians to defendant's testator is evidenced by a written instrument attached to the complaint, Exhibit A (Record, p. 12). Briefly, it is in the form of a bond of defendant's testator (jointly and severally with his father and brother) to the guardians of the appellant (and her sister, to whose interest plaintiff succeeded as alleged in the complaint) (Record, p. 10). This instrument, executed August 9, 1920, acknowledged an indebtedness in the sum of $60,000 and is an absolute agreement to

pay that sum. The instrument then refers to a bond of the Hanan Realty Company secured by a mortgage on its property executed in 1907, which bond and mortgage are stated to be owned by one of the obligors, who is about to assign said bond and mortgage to appellant's guardians, and states:

> "WHEREAS, to induce the said obligee to advance the said sum of sixty thousand dollars ($60,000) upon the said bond and mortgage, as aforesaid, and to execute and deliver the said extension agreement the said obligors hath agreed to make, execute and deliver this bond as further and additional security for the payment of the said above-mentioned bond and mortgage."

Then follows the condition that if the obligors of the 1920 bond or the John H. Hanan Realty Company pay the appellant's guardians $60,000 and interest, and if the obligors of the 1920 bond indemnify the obligees against any loss, damages, costs, expenses, etc., by reason of any default in the 1907 bond, then the 1920 obligation is to be void.

It is to be observed that the transaction was not a sale of the 1907 bond and mortgage with a guaranty. It was a loan or advance to the owners of the 1907 bond, and the obligation of the borrowers is to repay, not upon condition but absolutely. If the obligors repaid the loan it would not extinguish the *mortgage* debt of the John H. Hanan Realty Company. The obligors would be entitled to a reassignment of the 1907 bond and mortgage. The instrument sued upon is a new and original obligation. It is not a mortgage debt and it is not a guaranty of a mortgage debt.

In 28 *Corpus Juris*, page 886, §1, it is stated:

> "The term 'guaranty' or 'guarantee' as it is called by some authorities, especially the English and Canadian jurists and text writers, is a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some contract or duty in case of the default of another person, who in the first instance is liable for such payment or performance; a collateral promise or undertaking to pay a debt owing by a third person in case the latter does not pay. It is an agreement by one

person to answer to another for the debt, default, or miscarriage of a third person. * * * In a strict or collateral guaranty the obligation of the guarantor is that the principal is able and will perform his undertaking, or, if he fails, that the guarantor will pay the resulting damages; but where the promise of the guarantor is to do that which another is bound to do if he shall not do it himself, it is not a strict or collateral guaranty, but is an original undertaking in the nature of suretyship, and if it can be seen that the person sought to be held is primarily liable, prior to the breach of the contract or duty by someone else, the contract in question is an original promise or undertaking and not one of guaranty; and, although a contract is in form to answer for the debt or default of another, if its leading purpose is to secure some benefit to the promisor or to promote his interest, it will be regarded as an original undertaking."

In *Clark* v. *Howard*, 150 N. Y., at page 239, the Court said:

"The character of the defendants' promise is not to be determined solely with reference to the language employed. Words to the effect that a third party will see the debt paid, or become responsible or the like, have been held to import an original and absolute promise when taken in connection with the facts and circumstances of the transaction. (*Chase* v. *Day*, 17 Johns. 114; *Mountstephen* v. *Lakeman*, L. R. [7 Eng. & Ir. App.] 17.)

It is true that the meaning of such words, whether imputing an original or collateral promise, has been discussed mostly in cases where the Statute of Frauds has been relied upon as a defense; still the same principle will apply in any case where it is material to determine whether a promise is original or not. If the defendants intended to and did make this debt their own by a promise founded upon a new and original consideration of benefit to the defendants, moving to them from the debtor, the fact that the debt may still subsist against the original debtor is no objection to a recovery."

In *Matter of People* (Title & Mortgage Guarantee Co.), 264 N. Y., at page 88, the Court said:

> "It is said that the certificate holders are the owners of the mortgages underlying the certificates * * *. Though the certificate states that the company 'assigns to the registered holder hereof an undivided, coordinate share of the same amount in the principal sum secured by the bonds and mortgages deposited or which may hereafter be deposited by the Company with the Marine Trust Company of Buffalo, * * * as depositary under the terms of an agreement bearing date June 10, 1927, subject to which this certificate is issued, together with interest thereon at the rate of 5½% per annum,' an analysis of all the terms of the certificate and of the contract, to which it is subject, discloses that the guaranty company has entered into an unconditional promise to pay, ten years from the date of the certificate, the principal sum secured and accrued interest and has transferred to the holder only an interest in the deposited mortgages as collateral security for its debt. Certainly the holder acquires, prior to default, no rights in the mortgages other or greater than the rights of a holder of collateral security and the guaranty company retains at least the rights of an owner who has cumbered his title with a lien. True the certificate provides that the guaranty company shall exercise these rights as 'agent' for the holder of the certificate, *but we construe the contract in accordance with its substance and effect, not with its form.* So construed, the guaranty company *is a primary debtor*, assigning the mortgages only as collateral security for the debt." (Italics ours.)

In the case at bar, the instrument does not say that appellee's testator will pay *if* or *in the event* that the Hanan Realty Company does not pay. It does not say that the obligors will pay the 1907 bond at all. The obligors in the instrument sued on acknowledge an indebtedness of $60,000, *which sum they agree to pay.* They say they are procuring an *advance* on the 1907 bond and mortgage owned by the obligors and which they are assigning to the obligee. They say that if the 1907 bond is paid, or if they themselves pay

the full amount of $60,000 and interest, then the obligation is to be void. They also *indemnify* obligee against any "loss, damages, costs, expenses, suits, actions, claims and demands, etc.," by reason of default in the terms of the 1907 bond and mortgage. This indemnity covers expense incident to protect the mortgage lien, such as taxes, assessments, insurance, legal costs and expenses of any action affecting it.

The obligors in the 1920 bond could not be sued upon the 1907 bond for nowhere did they agree to pay it. It is a direct and unconditional obligation to repay the moneys advanced to the obligors. It is not a "mortgage" debt or a guaranty of a mortgage debt, nor does the bond make the obligors liable for a mortgage debt "directly, indirectly or contingently."

POINT II.

Appellant's contract has been materially impaired if Chapter 794 of the Laws of 1933 is applicable thereto.

In *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, the Court say:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike, those which affect its validity, construction, discharge, and enforcement. * * *"

And at page 552:

> "* * * Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."

And in *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 638, 640, it is said:

> "To know the obligations of a contract we look to the laws in force at its making."

See also *Rutherford* v. *Cook,* 198 N. Y. 29, 33 (1910), and *N. Y. Life Ins. Co.* v. *Guttag,* 265 N. Y. 292, 296 (1934).

Prior to the enactment of Chapter 794, Laws 1933, the appellant could foreclose upon her collateral security and then maintain an action to recover the unpaid balance of her loan to appellee's testator. §1082 of the Civil Practice Act provides for final judgment in foreclosure directing a sale of the property and §1083 provides for a final judgment against any person liable for the residue of the debt remaining unsatisfied after the sale and the application of the proceeds.

The Court of Appeals held in *Feiber Realty Corp.* v. *Abel,* 265 N. Y. 94, that the docket of a deficiency judgment was merely a clerical act in pursuance to the direction of the judgment entered, citing *Morris* v. *Morange,* 38 N. Y. 172.

Since the enactment of Chapter 794, Laws 1933, under §1083-b of the Civil Practice Act, the New York court has held that appellant *must* credit upon her loan to appellee's testator the "fair and reasonable market value" of the mortgaged property, and that having alleged that a deficiency judgment was denied in the foreclosure action her loan must be deemed to have been repaid by legislative enactment.

The New York Court of Appeals say in *City Bank Farmers Trust Co.* v. *Ardlea,* 267 N. Y. 225, that

> "Sections 1083-a and 1083-b were enacted at the same time as Sections 1077-a and 1077-b and as part of the general purpose of affording relief to distressed debtors. * * * Section 1083-a prevents a deficiency judgment when the court finds that the fair market value of the premises covered by the mortgage equals or exceeds the amount specified in the judgment and prior liens. Section 1083-b affords the same protection, in actions against makers or guarantors of bonds, 'against any person or corporation directly or indirectly or contingently liable therefor.' "

These sections obviously impair the contract rights of this appellant.

If the mortgagor does not pay interest or taxes for any reason, certainly the holder of the mortgage, whether as security or otherwise, should do something for his own protection. The necessities of the holder may be fully as great, if not greater, than those of the mortgagor. If nothing is done the debt will increase at an alarming rate. The holder *must* do something to save himself the utter loss of his security and his entire debt. If he proceeds to foreclosure and sale—and there is nothing to prevent—he obtains whatever the property brings or the property itself, which he may not want. The property may have become largely depreciated and may not earn enough to pay taxes.

Now, the New York statute says (§1083-a) that

> "No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided."

The statute then states that within ninety days after the date of sale a motion may be made for a deficiency judgment and the Court shall determine "the fair and reasonable market value of the mortgaged premises as of the date of sale" and shall limit the deficiency judgment accordingly, and adds:

> "If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceedings shall exist."

Under §1083-b, if suit is brought on a bond or any guaranty or indemnity, even if only indirectly secured by mortgage, the value of the property, to be determined by the Court, may be *offset or credited against the amount due.* In other words, a penalty is imposed upon anyone who dares

to sell in foreclosure or bring suit upon an obligation secured in any remote degree by a mortgage during the emergency when in all conscience he must do something to protect himself against a defaulting debtor and the penalty is a loss of his contract rights. In the case at bar, appellant has been deprived of her contract rights—not *temporarily*, but *absolutely and forever*. What about the debtor? What is he required to do? *Nothing*. He may be rich or poor, it makes no difference. At the time of making this contract, as the Court of Appeals in *Sliosberg* v. *New York Life Ins. Co.*, 244 N. Y. 482, at page 498, say:

> "That a debtor has lost the wherewithal to pay is no defense, whether its loss is attributable to simply robbery or to piracy which has been coated white by legislation."

But now he does not have to show his financial status. He is not required to trustee his property, as security. He is given relief which is neither temporary or on condition, and he does not even have to ask for relief.

Where, in appellant's contract with the appellee's testator, does she agree that the Court may determine the value of the property and that the debt is to be paid in full or to the extent that the Court may direct? *Where did she agree that her loan could be repaid by legislative enactment and not by legal tender?* If a debtor is really distressed he has a remedy by bankruptcy, but the Legislature of the State of New York has no power to give to a debtor the benefits of the Bankruptcy Act, nor has it power to impose any of the conditions set forth in §1083-a and §1083-b in reduction of the amount due.

POINT III.

The provisions of Chapter 794, Laws of 1933, impair the obligations of appellant's contract and thus violate the constitutional prohibition upon such legislation.

The Constitution of the United States states:

> "No state shall * * * pass any * * * law impairing the obligations of contracts. * * *" (Art. 1, Sec. 10).

In the case of *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), the Court said (p. 431):

> "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges* v. *Crowninshield*, 4 Wheat. 122 [1819], pp. 197, 198) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."

In *Green* v. *Biddle*, 8 Wheat. 1 (1823), the Court said (p. 17):

> "It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

In *Bronson* v. *Kinzie*, 1 How. 311 (1843), the Court said (p. 316):

> "* * * Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

Likewise, the Court, in *McCracken* v. *Hayward*, 2 How. 608 (1844), significantly stated (p. 612):

> "* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favour of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In *Bronson* v. *Kinzie, supra*, two Illinois statutes were involved, the first of which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure, and the second, that there should be no sale unless two-thirds of the appraised value of the property should be bid therefor. The Court held both statutes unconstitutional. In condemning the second, the Court said (p. 320):

> "The observations already made in relation to the other act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible."

In the cases of *McCracken* v. *Hayward, supra, Gantly's Lessee* v. *Ewing*, 3 How. 707 (1845), and *Howard* v. *Bugbee*, 24 How. 461 (1860), the decision in *Bronson* v. *Kinzie, supra*, was followed. The *McCracken* case, *supra*, condemned a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of householders, while the case of

Gantly's Lessee condemned a statute which required a sale for not less than one-half the appraised value. *Howard* v. *Bugbee, supra,* made a similar ruling as to an extension of two years for redemption from foreclosure sale. *Edwards* v. *Kearzey,* 86 U. S. 595 (1877), condemned as unconstitutional a statute which, as applied to existing contracts, increased the amount of the property of judgment debtors which was exempted from levy and sale on execution. And in *Barnitz* v. *Beverly,* 163 U. S. 118 (1896), it was held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This decision was followed by the Court in *Bradley* v. *Lightcap,* 195 U. S. 1 (1904), in condemning a statute which effected a forfeiture of the mortgagee's estate upon his failure to obtain a deed within the prescribed time after bidding in the mortgaged premises at sale on foreclosure.

Upon the same principles, State Courts have condemned statutes which, as applied to existing mortgages, permit foreclosure sales only for not less than a fixed percentage of the appraised value of the property.

Swinhouse v. *Mills,* 17 Wash. 611, 50 Pac. 489 (1897);
Strand v. *Griffith,* 63 Wash. 334, 115 Pac. 512 (1911);
Robards v. *Brown,* 40 Ark. 423 (1883).

The principle stated in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, has been materially clarified by the further decisions of the United States Supreme Court in

W. B. Worthen Co. v. *Thomas,* 292 U. S. 426;
W. B. Worthen Co. v. *Kavanaugh,* 295 U. S. 56;
Louisville Bank v. *Radford,* 295 U. S. 920.

In the first of these cases, *W. B. Worthen Co.* v. *Thomas,* the Court, referring to the *Blaisdell* case, said (pp. 433-434):

> "In *Home Bldg. & L. Asso.* v. *Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State

must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy *the repudiation of debts or the destruction of contracts or the denial of means to enforce them.*' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency.* Accordingly, in the Blaisdell case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*

'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied, to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *W. B. Worthen Co. v. Kavanaugh,* the Court (unanimously) said:

> "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage, without moderation or reason, or in the spirit of oppression, even when the public welfare is involved as an excuse, their bounds must be respected,"

and condemned the Arkansas legislative acts as unconstitutional, distinguishing the *Blaisdell* case.

In *Louisville Bank* v. *Radford* the Court held certain provisions of the Frazier-Lemke Act unconstitutional, citing, applying and distinguishing the principles of the *Blaisdell* case and the two cases above referred to. The Court said:

> "Under the Act, the purpose of the *delay* in making a sale *and of the prolonged possession accorded the mortgagor* is to promote his interests at the expense of the mortgagee.

> *Home Bldg. & L. Asso.* v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the period had been decided upon, it could, as was pointed out, be reduced by order of the court under the statute, in case of a change in circumstances, * * *' (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt (pp. 933-934) * * *."

In the case of *Beaver County Building & Loan Assn.* v. *Winowich* [No. 153, Oct. 5, 1936, reported only at the time of this writing in Advance Sheets of Nov. 14th, 187 Atl. (Pa.) 481] there was under consideration the Pennsylvania Mortgage Deficiency Act (1934), and it was held unconstitutional as to mortgages contracted before its enactment because of the constitutional provision prohibiting the impairment of obligations of contracts. Under the laws of Pennsylvania in effect at the time of the enactment of the statute, a mortgagee was entitled to a deficiency judgment in an amount equal to the amount of the mortgage debt, interest and costs, after deducting therefrom the net proceeds of a foreclosure sale. The Act under consideration provided for a deficiency judgment in an amount fixed by deducting the fair value of the property instead of the proceeds of the foreclosure sale. The Court say:

> "The sale price is no longer conclusive between the parties as to the credit to be allowed on the debt, and the amount of the deficiency judgment to which the mortgage was previously entitled is thus altered to a substantial and, it may be, drastic degree. * * *
>
> The remedy, or means of enforcing a contract, is a part of its obligation which the Constitution protects. TheLegislature has the power to formulate, alter and suspend modes of procedure, even as to pre-existing contracts, provided, that, under the guise of a procedural statute, it does not deprive a party of any substantial right under the contract. *Breitenbach* v.

Bush, 44 Pa. 313, 318, 320; *Penrose* v. *Erie Canal Co.,* 56 Pa. 46, 48; *West Arch Building & Loan Association* v. *Nichols,* 303 Pa. 434. Any change in procedure which does not supply an alternative remedy, equally adequate and efficacious, in place of that which existed when the contract was made, is violative of the constitutional prohibition. The ideas of right and remedy are inseparable. *Greene* v. *Biddle,* 8 Wheat. 1, 17; *Walker* v. *Whitehead,* 16 Wall. 314, 317; *Edwards* v. *Kearzey,* 96 U. S. 595, 600; *McGahey* v. *Virginia,* 135 U. S. 662, 693; *Barnitz* v. *Beverly,* 163 U. S. 118, 127; *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439. * * *

The change wrought by the Pennsylvania Mortgage Deficiency Judgment Act is one not merely of remedy but of substance. Whereas before its enactment the mortgagee after a sale on foreclosure had the important right to a judgment measured by the difference between the debt and the net proceeds realized from the sale, by the terms of the act this judgment is reduced by substituting the 'fair value' of the property for the price obtained at the sale as the amount of the credit to be allowed."

After citing *Home Bldg. & L. Assn.* v. *Blaisdell* and *W. B. Worthen Co.* v. *Kavanaugh,* and many of the cases hereinbefore referred to, the opinion adds:

"While it is true that none of the cases thus summarized is wholly analogous to the present one, they lead fairly to the conviction that a statute which compels a mortgagee to accept real estate at an appraised valuation, in place of money, as a part liquidation of the mortgagor's obligation on the bond, must, as applied to pre-existing mortgages, be held to be unconstitutional if the obvious trend of these decisions in the Supreme Court of the United States is to be followed.

This conclusion is strengthened by the almost complete unanimity of state courts in striking down recent legislation curtailing the rights of mortgagees—some of it practically identical with the act now under consideration. * * *"

And at page 492:

"It is contended that it is unfair to allow a mortgagee, under existing conditions, to bid in the mort-

gaged property for a nominal sum, thereby enriching himself by acquiring the security and at the same time retaining the right to collect what might amount to almost the entire debt from other property of the mortgagor.

It may be questioned whether mortgagees in many cases have been able to realize more from both acquisition of the property and collection on the bond than the amount of the debt, interest and costs. Even if, however, as a bidder at the foreclosure sale, a mortgagee obtains the property at a cheap price, he accomplishes this, as already stated, in an independent capacity and not as mortgagee; as a purchaser he obtains the same title as might have been acquired by any member of the general public in competitive bidding. Moreover, if the system of foreclosure in use does bring about undesirable results, it may be corrected by the parties' originally contracting to adopt the appraisement method (assuming that an investor could be induced to loan money on the security of a mortgage with such a provision), or, as to future mortgages, by appropriate legislation. But as to existing mortgages the constitutions of Nation and State alike prohibit any such impairment of the mortgagee's rights."

In *Sayre* v. *Duffy*, 13 N. J. Misc. 458, 179 Atl. 459, the New Jersey statute, Chapter 82 of the Laws of 1933, providing that the Court should determine the amount of the deficiency in mortgage foreclosures by deducting from the amount of the debt the fair market value of the premises, was held to be unconstitutional, the Court saying:

"The effect is not to delay the remedy but to abrogate completely the rights of the mortgagee to a deficiency judgment."

Vanderbilt v. *Brunton Piano Co.*, 111 N. J. L. 596, 169 Atl. 177, likewise holds the New Jersey statute unconstitutional.

In *Beaver County Building & Loan Assn.* v. *Winowich*, *supra*, the Court say (p. 491) that

"New York is apparently the only state that has sustained the validity of a mortgage deficiency judgment

> act similar to the Pennsylvania statute. The act temporarily stayed foreclosures and suits to recover the mortgage indebtedness if interest and taxes were paid. It also provided for a deficiency judgment to be fixed at the time of confirmation of the sale, allowing a credit for the market value of the property as determined by the court, or the sale price, whichever might be the higher. In actions to recover the indebtedness secured by the mortgage, the debtor was to be allowed to set off the 'fair and reasonable market value' of the property. In a brief opinion on the question of constitutionality, unsupported by any citation of authorities, the court upheld the act. *Klinke* v. *Samuels*, 264 N. Y. 144."

The New York Court of Appeals, however, added:

> "That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People* (*Title & Mortgage Guarantee Co.* v. *Buffalo*) (264 N. Y. 69), and *Home Building & Loan Assn.* v. *Blaisdell* (290 U. S. 398)."

In *Home Bldg. & Loan Assn.* v. *Blaisdell*, this Court sustained the constitutionality of the Minnesota Mortgage Moratorium Law, stating:

> "We are here concerned with the provisions of Part One, §4, authorizing the District Court of the County to extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable,' subject to the above described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or if it has no income, then the reasonable rental value of the property and directing the mortgagor 'to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness at such times and in such manner' as shall be determined by the court."

The Minnesota statute did not suspend foreclosure or regulate deficiency judgments. It *extended* the period of redemption *after* foreclosure for a period not exceeding two years *upon terms and conditions* to be fixed by the Court after a hearing.

We do not here question Chapter 793 of the Laws of 1933, which prohibits foreclosure during the emergency period *so long as interest and taxes* are paid and as to which it might be said that it is "temporary relief." We are concerned *only* with Chapter 794, which clearly impairs remedies against mortgagors, guarantors, indemnitors, or persons liable in any way to a holder of a mortgage; and in the case at bar is held to be an actual bar to an action to recover upon a loan for which there was pledged as security a bond and mortgage, as we have already pointed out in our Point II. Under the Minnesota statute a debtor was required to apply for relief and show facts to a court of equity to justify a brief extension for redemption *upon terms and conditions.* Under the New York act a debtor does nothing and no consideration whatever is given to the rights of the creditor. The New York act simply benefits the debtor by releasing him from his obligation.

No such question as is here presented was passed upon by this Court in the *Blaisdell* case.

This Court has consistently held over many years that the vacation or serious modification of pre-existing law as it affects an existing contract is repugnant to Section 10 of Article 1 of the Constitution.

W. B. Worthen Co. et al. v. *Kavanaugh,* 295 U. S. 56, 79 L. Ed. 1298 (1935);

W. B. Worthen Co. v. *Thomas,* 292 U. S. 426, 78 L. Ed. 1344 (1934);

Bradley v. *Lightcap,* 195 U. S. 1, 49 L. Ed. 65 (1904);

Barnitz v. *Beverly,* 163 U. S. 118, 41 L. Ed. 93 (1896);

McGahey v. *State of Virginia,* 135 U. S. 662, 34 L. Ed. 304 (1890);

Edwards v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793 (1878);

Walker v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357 (1873);

Gunn v. *Barry*, 15 Wall. 610, 21 L. Ed. 212 (1873);

White v. *Hart et al.*, 13 Wall. 646, 20 L. Ed. 685 (1872);

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. Ed. 403 (1867);

Howard v. *Bugbee*, 24 How. 461, 16 L. Ed. 753 (1861);

Guntly v. *Ewing*, 3 How. 707, 11 L. Ed. 794 (1845);

McCracken v. *Hayward*, 2 How. 608, 11 L. Ed. 397 (1844);

Bronson v. *Kinzie*, 1 How. 311, 11 L. Ed. 143 (1843).

Many of the State courts which have had occasion to pass upon the constitutionality of similar legislation have similarly decided:

Travelers Ins. Co. et al. v. *Marshall et al.*, 124 Tex. 45, 76 S. W. (2nd) 1007 (1934);

Federal Land Bank of Omaha v. *Wilmarth et al.*, 218 Iowa 339, 252 N. W. 507, 90 A. L. R. 1330 (1934);

Hanauer v. *Republic Bldg. Co.*, 216 Wis. 49, 225 N. W. 136 (1934);

Langever v. *Miller*, 124 Tex. 80, 76 S. W. (2nd) 1025, 96 A. L. R. 836 (1934);

State ex rel. Roth v. *Waterfield*, 167 Okla. 207, 29 P. (2nd) 24 (1933);

State ex rel. Cleveringa v. *Klein*, 63 N. D. 514, 249 N. W. 118, 86 A. L. R. 1523 (1933);

Adams et al. v. *Spillyards et al.*, 187 Ark. 641, 61 S. W. (2nd) 686, 86 A. L. R. 1493 (1933).

Clearly, the New York statute, Chapter 794, Laws of 1933, must be held violative of appellant's contract rights.

It is to be noted that the New York act referred to does not postpone foreclosure where interest and taxes are *not* paid. It does not prevent or postpone actions on bonds where interest and taxes are *not* paid. It simply provides that *where the mortgagor is in default,* the mortgagee will be required to suffer a loss of his rights, if he pursues *any* remedy, and the New York act is held to apply to appellant's contract.

Such an act violates every principle of equity and cannot be sustained under Article 1, §10, of the Constitution of the United States.

Respectfully submitted,

ROBERT B. HONEYMAN,
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61 Broadway,
New York City, N. Y.

APPENDIX.

The New York Statute, Chapter 794 of the Laws of 1933, reads as follows:

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mortgages on real property and actions to recover judgments on bonds secured by mortgages on real property.

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, and the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD.—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date

of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

"§ 1083-b. JUDGMENTS IN ACTIONS ON BONDS.—In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured solely by a mortgage on real property and which originated simultaneously with such mortgage and which is secured by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been

enacted but the amount of any money judgment recovered as provided in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two.

"5. This act shall take effect immediately."

By Chapter 277, Laws 1934, the period of emergency was extended to July 1, 1935; and by Chapter 2, Laws of 1935, was further extended to July 1, 1936. It has since been extended to July 1, 1937.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 370

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HERBERT W. HANAN, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT DISCLOSING MATTER OR GROUND MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, AND INCLUDING MOTION BY APPELLEE TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF NEW YORK.

JAMES S. BROWN, JR.,
Attorney for Appellee.

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SUPREME COURT OF THE UNITED STATES

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STATEMENT DISCLOSING MATTER OR GROUND MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, AND INCLUDING MOTION BY APPELLEE TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF NEW YORK.

Now comes the appellee, pursuant to paragraph 3 of Rule 12 of the Rules governing the practice of the Supreme Court of the United States, files herein this statement, and respectfully shows that the Supreme Court of the United States has no jurisdiction to review the judgment in this

case of the Supreme Court of New York, upon the following grounds:

1. The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause.

2. The Federal question now raised, although presented in the appellate State Court, was not timely and was not duly presented and is not timely or duly presented here.

If jurisdiction be taken of this cause, the said appellee respectfully moves that the appeal herein be dismissed, or, in the alternative, respectfully moves that the judgment of the Supreme Court of New York, appealed from, be affirmed, and in support of such motion points out:

3. The decision of the New York Supreme Court on the question raised is in express harmony with the uniform decisions of this Court.

Statement.

This is an appeal from a judgment of the Supreme Court of the State of New York, County of Kings, unanimously affirmed, without opinion, by the Appellate Division of the said Supreme Court of the State of New York for the Second Judicial Department, and unanimously affirmed, without opinion, by the Court of Appeals of the State of New York, the highest court of that State.

There is no dispute about the facts involved, but since some of them are omitted from the appellant's statement the appellee deems it necessary to elaborate upon that statement and give the facts in more detail to insure accuracy and clarity.

On August 26, 1933, there became a law of the State of New York, Chapter 793 of the Laws of 1933 of that State (which is set forth *verbatim* in the appendix annexed

hereto), which was entitled "An Act to amend the Civil Practice Act in Relation to Foreclosure of Mortgages and Actions for Judgments on Bonds Secured by Mortgages", which added to the Civil Practice Act new Section 1077-a, temporarily suspending foreclosure for principal defaults; Section 1077-b, temporarily suspending actions on bonds (secured by mortgages), for principal defaults; Section 1077-c, giving mortgagees the right to apply all income over carrying charges to past due principal; Section 1077-d, prohibiting waiver of any of these provisions as against public policy; Section 1077-e, applying these provisions to pending actions; Section 1077-f, suspending the Statute of Limitations against actions otherwise maintainable during the emergency period, and Section 1077-g, defining the emergency period as from August 26, 1933, to July 1, 1934, and limiting any declaration of unconstitutionality to the section involved in the controversy.

Then two days later, on August 28, 1933, there was passed and became a law Chapter 794 of the Laws of 1933, which was entitled: "An Act to Amend the Civil Practice Act, in Relation to Deficiency Judgments, and Actions to Foreclose Mortgages on Real Property, and Actions to Recover Judgments on Bonds Secured by Mortgages on Real Property."

That Chapter is incorporated in the appellant's statement as to jurisdiction.

(It is a correct copy thereof, except for the following typographical mistakes:

In the first sentence of Section 1083-b (appellant's statement, page 7, line 23) the word "action" should be "section"; and in that same sentence and on line 29 of that same page there should be inserted after the words "is secured" the word "solely". And at the end of that sentence and in line 34 the word "en" should be omitted. On page 8 of the appellant's statement after the last line

quoted from said Section 1083-b, the appellant has omitted a paragraph of the law reading:

"5. This act shall take effect immediately.")

This Chapter 794 added to the said Civil Practice Act new Section 1083-a, temporarily limiting deficiency judgments in actions brought during such emergency period, and new Section 1083-b, temporarily giving the defendant, in an action on a bond instituted during such emergency period, the right to set off the fair and reasonable value of the mortgaged property.

On September 22, 1933, which was less than one month after these Mortgage Moratorium laws took effect, the appellant, alleging herself to be the owner and holder of a bond and mortgage made by one John H. Hanan (then deceased) and the John H. Hanan Realty Company, instituted an action in the New York Supreme Court, New York County, to foreclose the mortgage and for a deficiency judgment. The appellee was a defendant in that action and interposed an answer. The appellant then made a motion for summary judgment against the said John H. Hanan Realty Company and this appellee, which motion was denied as to this appellee but granted as to the said John H. Hanan Realty Company. A decree of foreclosure was entered by the appellant without attempting to bring on for trial and having adjudicated the issues raised by the appellee's answer; and the mortgaged property was sold to the appellant on March 2, 1934. She subsequently moved for a deficiency judgment against the said John H. Hanan Realty Company, which motion was referred to an Official Referee, who, after hearing oral testimony and proofs found, as a fact, that the value of the mortgaged property exceeded the amount of the mort[illegible]ge and the said application of the appellant for a deficiency judgment was therefore denied on May 25, 1934. The following year, on March

20, 1935, the action was discontinued as against this appellee.

In May, 1935, this action at bar was commenced, in the New York Supreme Court, Kings County, against the appellee alone on the collateral bond. The appellant sues herein for $57,969.34 plus interest, that representing the amount due on her mortgage, plus interest and taxes, and foreclosure costs, less the $10,000 at which she bid in the property on the foreclosure sale and less the net rents collected by the receiver. The appellee moved to make the complaint more definite so as to present the basic facts above and the appellant then served the amended complaint which is now part of the record (R. 10).

The allegations of paragraphs IX and X of said amended complaint (R. 13) expressly refer to the said previous foreclosure action, the sale of the property thereunder, the motion for the deficiency judgment and the denial of such motion.

Before the defendant interposed any answer to the amended complaint and before his time to answer had expired, he moved to dismiss the same on the ground that it did not state facts sufficient to constitute a cause of action. Said motion was granted at Special Term, Part I of the Supreme Court, Kings County, and the only decision rendered thereon was the following memorandum:

> "Motion by defendant to dismiss the amended complaint is granted. The Mortgage Moratorium Laws apply to the facts alleged in said complaint."

After that decision and the judgment entered thereon were unanimously affirmed by the Appellate Division, and then unanimously affirmed by the Court of Appeals, the remittitur of the Court of Appeals, on motion of the appellant, was amended to provide:

> "A question under the federal constitution was presented and necessarily passed upon by this Court.

> The plaintiff contended that Chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of the Civil Practice Act), impair the obligations of contracts and thus violate Article 1, Section 10 of the Constitution of the United States. This Court held that such laws did not violate said provision of Article 1, Section 10, of the Constitution of the United States."

The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause and the same judgment could have been rendered without deciding it.

It is urged that where the record discloses that the judgment of a State court was based not alone upon a ground involving a Federal question but also upon another independent ground broad enough to maintain the judgment, this Court will not take jurisdiction and will dismiss a writ of error.

People ex rel. Doyle v. *Atwell,* 261 U. S. 590;
Eustis v. *Bolles,* 150 U. S. 361;
Dibble v. *Bellingham,* 163 U. S. 63;
Adams v. *Russel,* 229 U. S. 353;
Cuyahoga v. *Northern,* 244 U. S. 300;
Richardson v. *Scott,* 276 U. S. 129.

This is true in spite of the certification by the aforementioned amendment to the remittitur of the Court of Appeals.

Parmelee v. *Lawrence,* 11 Wall. 36;
Brown v. *Atwell,* 92 U. S. 327;
Adams County v. *Burlington,* 112 U. S. 123;
Powell v. *Brunswick,* 150 U. S. 433;
East Tennessee v. *Frazier,* 139 U. S. 288.

In the appellant's said motion to amend the remittitur, and in the order of the Court of Appeals entered thereon

and in the statement as to jurisdiction and other papers filed herein, no reference whatsoever was made by the appellant to Chapter 793 of the Laws of 1933 of the State of New York. It is only the constitutionality of Chapter 794 which is attacked. (Italics ours.)

There is a sharp distinction between the two chapters and the Court of Appeals of New York recognized that, when, in the decision of that Court in *Klinke v. Samuels* (*infra*), Judge Crane, at page 149, said:

> "Whatever inaccuracies in language there may be we are of the opinion that the Legislature intended to stay actions against guarantors by Section 1077 B. and to limit deficiency judgments against them by section 1083 b."

It was the provisions of Chapter 793 (Civil Practice Act, Section 1077-b), the constitutionality of which is not questioned, which precluded the plaintiff's action and made her complaint dismissable on motion. (Italics ours.)

The Court decided that the action was precluded by the "mortgage moratorium laws." The "mortgage moratorium laws" included both Chapters 793 and 794.

It was this Section 1077-b of the Civil Practice Act, that was expressly stressed and urged by the defendant (now the appellee) on the original motion and various appeals. That provided:

> "No action shall be maintainable * * * during such emergency upon any * * * collateral bond * * * so long as no action or proceeding shall be maintainable to foreclose such mortgage * * *."

Since her mortgage had already been foreclosed in 1933, no action or proceeding was maintainable by the appellant to foreclose it again in 1934, and therefore, no action was maintainable on this collateral bond in 1934.

If Chapter 794 was declared unconstitutional, the judgment of the New York Supreme Court would be just as sustainable by reason of that provision of Chapter 793 (Civil Practice Act, Section 1077-b), and the determination of the constitutionality of Chapter 794 was therefore not essential to the determination of the cause.

If Chapters 793 and 794 were both properly before this Court on this Federal question and both were unconstitutional the said amended complaint would have still been dismissable because of the provisions of Section 1078 of the Civil Practice Act which provides:

> "Action for mortgage debt subsequent to beginning foreclosure. While an action to foreclose a mortgage upon real property is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

Said amended complaint had no allegation that such leave of the court was procured, because, as a matter of fact it had not been procured.

The Federal question now urged by the appellant is not properly or timely raised.

It is alleged in paragraph "X" of the amended complaint (R. 13) that the appellant, in the foreclosure action had *duly* made a motion for a deficiency judgment, but the same was denied. Although the record of this case does not specifically set it forth, the plaintiff's allegation that she "duly" made such a motion is sufficiently broad to permit of reference to the record of that foreclosure action. It shows that this appellant as plaintiff therein, proceeded with her foreclosure and pursued all the advantages of the remedies afforded by Chapter 794 of the Laws of the State of New York, the constitutionality of which she now at-

tacks; that she did not question the constitutionality in that action, but entered a judgment therein which provided in part as follows:

> "Ordered, Adjudged and Decreed that the plaintiff may apply at the foot of the said judgment after sale thereunder pursuant to Section 1083-a of the Civil Practice Act (as inserted therein by Chapter 794 of Session Laws of the State of New York of the year 1933) for judgment thereon against the defendant, John H. Hanan Realty Company, for such deficiency, if any, as the Court shall deem the plaintiff entitled to."

That the plaintiff proceeded to sell the property; that she bought it in herself, and then duly made a motion for the deficiency; that such application was referred to an Official Referee and on the hearing before him the plaintiff produced her proofs as to what she considered to be the fair and reasonable market value of the property; that the Referee determined the market value thereof to be $70,000, which was greater than the amount due on the mortgage; that his report was confirmed by the said New York Supreme Court of New York County, and the application for a deficiency judgment was thereupon denied. The plaintiff took no appeal from that order of confirmation nor from any other order or judgment therein, but waited a year and then started this action at bar in May, 1935.

The point which the appellee makes is that it was in that foreclosure action that the appellant should have raised any question of the constitutionality of Chapter 794. If her rights were unconstitutionally impaired by such chapter, such impairment occurred then. The plaintiff having failed to urge unconstitutionality in that action, was precluded from doing so in this action or on this appeal.

(6 *Ruling Case Law, Secs.* 95 & 96:)

"The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense."

"Where a complaint is made that an act of the legislature or of an administrative board contravenes a constitutional right, the general rule is that it is the duty of the person whose rights are thus invaded to raise the objection at the earliest available opportunity and to exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute. The failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right."

Instead of attacking the constitutionality of the statute when she had the right so to do, the plaintiff not only elected to proceed with her foreclosure during that emergency period from August 26, 1933, to July 1, 1934, but in the judgment which she caused to be entered expressly adopted the statute, reserved her rights in accordance therewith and willingly submitted to the procedure prescribed thereby in applying for a deficiency judgment pursuant thereto. When her application for a deficiency judgment was denied, she did not attempt to appeal from that order of the Court, but instead, over a year later, proceeded with this second suit.

In her amended complaint in this second suit she did not claim or allege the unconstitutionality of the Chapter 794. Even in the memorandum of law submitted by her in Special Term in opposition to the appellee's motion to dismiss the amended complaint, the appellant made no claim of

unconstitutionality, although she had the same counsel then as she has now. It was after that motion was granted and in her brief to the Appellate Division that the appellant, for the first time, made a point of that question and even then, made it merely incidental to other points urging that these Mortgage Moratorium laws did not apply to her situation.

The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

In view of this Court's decision in *Home Savings & Loan Association* v. *Blaisdell,* 290 U. S. 398, sustaining the constitutionality of a similar statute in Minnesota, the Federal question involved in this case has been so thoroughly discussed and so explicitly foreclosed that there is really no basis for further argument in this Court.

The constitutionality of the New York Mortgage Moratorium laws was sustained by the New York State Court of Appeals in its decisions in the case of *Matter of People* (*Title & Mortgage Guarantee Company of Buffalo*), 264 N. Y. 69, and *Klinke* v. *Samuels,* 264 N. Y. 144, on the strength of that Blaisdell decision.

That decision is too recent to require any specific quotations. Suffice is to say that the statutes involved in that case and this are both Mortgage Moratorium statutes of a temporary nature to cope along the same lines with the identical emergency.

The situation which existed in Minnesota and which prompted their emergency measure in April, 1933, was no different and possibly not as acute as that which existed in New York and prompted its temporary measures in August, 1933. The larger number of buildings in New York State meant just that many more mortgages and made for more foreclosures and more deficiency judgments.

To quote from Judge Crane's decision in *Klinke* v. *Samuels* (*supra*):

> "As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.
>
> After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.
>
> "That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in Matter of People (Title & Mortgage Guarantee Co. of Buffalo) (264 N. Y. 69), and Home Building & Loan Assn. *v.* Blaisdell (290 U. S. 398)."

Section 794 of the New York Law (Sec. 1083-a of Civil Practice Act) did not impair any contract rights; it defined the procedure under which a deficiency judgment after foreclosure could be had; and temporarily limited such deficiency to an amount equal to the amount due on the mortgage plus interest, plus the amounts of all prior encumbrances, plus all the foreclosure costs and disbursements, less the market value of the property as determined by the court on the proofs submitted by the parties involved. Section 1083-b, Civil Practice Act, gave a party liable on a bond secured by mortgage the right to set off such market value less such amounts owing on prior encumbrances.

A foreclosure action is one in equity and the sale is subject to confirmation by the court. As was said by Mr. Justice Hughes in the *Blaisdell* case at page 446:

> "In the absence of legislation courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience."

This statute went no further. It tended to keep the deficiency judgments down to what they would have been in normal times and thereby avoid unjust enrichment to a mortgagee at the expense of the mortgagor.

It would be difficult to find a better example of "inadequacy of price" than in the case at bar. Here we have a piece of property which, in 1907, was obviously of sufficient value to stand a first mortgage of $118,000 (Paragraph 1 of amended complaint R. 10), which mortgage was, in 1920, reduced to $60,000. The property was sold at the foreclosure auction sale in 1934 to the plaintiff for $10,000. After taking the property she now seeks, in addition, a deficiency judgment for $57,969.34. A court of equity might readily refuse it as unconscionable, regardless of any emergency statutes.

Respectfully submitted,

JAMES S. BROWN, JR.,
Attorney for Appellee,
66 Court Street,
Brooklyn, N. Y.

APPENDIX.

Chapter 793.

AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

SECTION 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

SECTION 1077-a. FORECLOSURE FOR PRINCIPAL DEFAULTS SUSPENDED.—During the period of the emergency as defined in section ten hundred seventy-seven-g, and not withstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in

the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

SECTION 1077-b. ACTIONS ON BONDS FOR PRINCIPAL DEFAULTS SUSPENDED.—No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

SECTION 1077-c. NOTICE OF APPLICATION.—Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

SECTION 1077-d. WAIVER AGAINST PUBLIC POLICY.—Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

SECTION 1077-e. APPLICATION TO PENDING ACTIONS.—Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the

same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

SECTION 1077-f. STATUTE OF LIMITATIONS NOT TO RUN DURING EMERGENCY.—Any action or proceeding within the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

SECTION 1077-g. MORTGAGES NOT AFFECTED.—The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

SECTION 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

SECTION 4. This act shall take effect immediately.

JAN 7 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

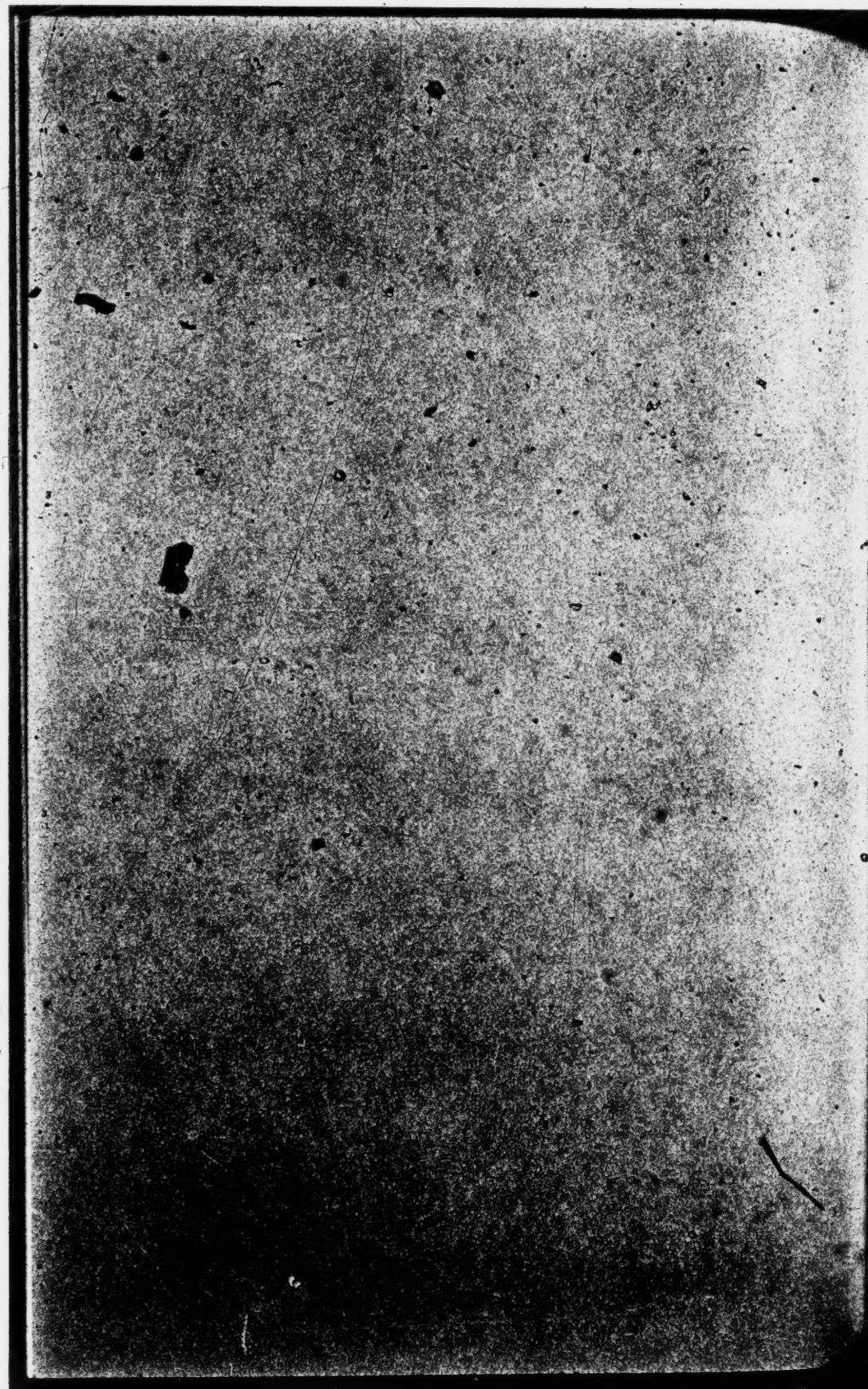
Appellee.

BRIEF OF APPELLEE.

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THE COURT PRESS, N. Y. C.



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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The appellee heretofore duly filed with this Court a statement against its jurisdiction and a motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of New York from which the appeal was taken. Upon consideration, the Court entered the following order on November 9th, 1936:

> "Further consideration of the question of jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

That motion was made, and is now renewed, upon the following grounds:

1. The decision of the Federal question now raised on this appeal was not necessary or essential to the determination of the cause;

2. The Federal question now raised, although presented in the appellate State Court, was not timely and was not duly presented and is not timely or duly presented here;

3. The decision of the New York Supreme Court on the question raised is in express harmony with the uniform decisions of this Court.

Opinions of Courts Below.

There were no reported opinions in the Courts below. The original judgment was entered in the Supreme Court of the State of New York, Kings County, on an order granting the appellee's motion to dismiss the appellant's amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action. That Court, at Special Term, thereupon rendered the following memorandum decision:

> "Motion by defendant to dismiss the amended complaint is granted. The Mortgage Moratorium Laws apply to the facts alleged in said complaint."

That judgment was unanimously affirmed without opinion by the Appellate Division of said Supreme Court (memorandum decision reported at 246 App. Div. 781 and 285 N. Y. S. 527) and then it was unanimously affirmed without opinion by the Court of Appeals of the State of New York, the highest Court of that State (memorandum decision reported at 271 N. Y. S. 564 and 3 N. E. (2nd) 186). The remittitur of that Court was then, on motion of the appellant, amended as provided on page 3 of the appellant's brief.

Statement of the Case.

In the short statement of the facts set forth at the beginning of the appellant's brief, there are omissions of certain facts which the appellee deems necessary and

pertinent to the points which he makes in this brief and he, therefore, sets them forth below in more detail to insure accuracy and clarity.

The facts are as follows:

On January 10, 1907, the John H. Hanan Realty Company made a bond and mortgage for $118,000 to certain third parties, which mortgage covered real property owned by said corporation on the southeast corner of Bleecker and Elizabeth Streets, Manhattan, New York City. John H. Hanan, individually, also executed the bond (Plaintiff's Amended Complaint, paragraphs I and II, R. 9). That bond and mortgage were some years thereafter assigned to said John H. Hanan, individually.

On August 9, 1920, said bond and mortgage were assigned by said John H. Hanan to the appellant's General Guardians. At the same time, an extension of mortgage showing a balance due thereon of $60,000, was also executed between the parties. Simultaneously this appellee's testator, Herbert W. Hanan, and one Addison G. Hanan and said John H. Hanan, executed the collateral bond for $60,000 now involved in this action.

The appellant persistently contends that this bond was an independent undertaking secured by the bond and mortgage (R. 10, and Appellant's Brief, pp. 6-10), whereas by its express terms it is an ordinary collateral bond made as a guaranty of the aforementioned original bond and mortgage. The State Courts, by their consistent affirmances, have decided it is a collateral bond.

Thereafter the said bond and mortgage and said collateral bond were assigned to the appellant (R. 10 and 11).

The said John H. Hanan died in 1920, and Addison

G. Hanan died in 1923. Herbert W. Hanan died July 21, 1933.

On August 26, 1933, and August 28, 1933, there became laws in the State of New York Chapters 793 and 794 of the Laws of 1933, commonly referred to as the "Mortgage Moratorium Laws".

Although the appellant raises no question as to the constitutionality of Chapter 793 and questions only Chapter 794 (Appellant's Brief, p. 22), it is nevertheless necessary for this Court to know what is provided in Chapter 793 in order to determine the reasonableness of the legislation. Chapter 793 is therefore set forth in the appendix to this brief.

Chapter 794, which became effective two days after Chapter 793, is set forth in the Appendix to appellant's brief.

On September 22, 1933, which was less than one month after these Mortgage Moratorium Laws took effect, the appellant, after taxes and interest on the mortgaged premises were in default, instituted an action in the New York Supreme Court, *New York* County, to foreclose the aforementioned mortgage in which she demanded a deficiency judgment against the said John H. Hanan Realty Company and the Estate of Herbert W. Hanan, deceased, the appellee.

The appellee interposed an answer in that action which consisted of denials and affirmative defenses. The appellant then made a motion for summary judgment against the John H. Hanan Realty Company and the appellee, which motion was denied as to the appellee but granted as to the said John H. Hanan Realty Company.

A judgment of foreclosure was shortly thereafter entered by the appellant without her attempting to bring on for trial and having adjudicated the issues raised by the appellee's said answer. The said judg-

ment followed the procedure outlined in said Chapter 794, and provided in part:

> "Ordered, Adjudged and Decreed that the plaintiff may apply at the foot of the judgment, after sale thereunder pursuant to Section 1083-a of the Civil Practice Act (as inserted therein by Chapter 794 of Sessions Laws of the State of New York for the year 1933) for judgment thereon against the defendant John H. Hanan Realty Corporation for such deficiency, if any, as the Court shall deem the plaintiff entitled to."

The mortgaged property was sold to the appellant on March 2, 1934, on the first and only bid of $10,000.

She subsequently moved, pursuant to said Chapter 794, the constitutionality of which she now questions, for a deficiency judgment against the said John H. Hanan Realty Company, which motion was referred to Hon. James A. O'Gorman, Official Referee, who, after hearing oral testimony and proofs, rendered a report, as follows:

> "The mortgaged premises consist of an approximately rectangular plot situated at the southeast corner of Bleecker and Elizabeth Streets, measuring 63′ 7½″ on Bleecker Street and 90′ on Elizabeth Street, improved with a seven story and basement brick loft and manufacturing building. The building is of semi-fireproof substantial construction with a floor carrying capacity of from 150 to 175 pounds to the square foot, it is equipped with a sprinkler system throughout, an elevator, and a plant for supplying steam heat which was originally designed also to supply live steam. The building is suitable for a variety of industrial uses and is situated in proximity to a large and cheap labor market. The mortgage under foreclosure for the principal amount of $60,000 was made in 1919,

through the reduction in amount and assignment of an earlier mortgage, and the assessed valuation of the property for purposes of taxation in 1919 was $97,000. The plaintiff's expert witness, Brown, testified that in his opinion the fair and reasonable value of the building in such market as existed on March 2, 1934, the date of the sale, was $45,000, but on cross-examination he admitted that he knew of no sales in the vicinity of the property for several years and stated that the last ready market for property in that vicinity was sometime previous to 1929. In making this appraisal of $45,000, the witness, Brown, attributed $33,000 to the value of the land, and $12,000 to the value of the building; he further testified that at the present time in his opinion the building had a rental value of about $13,000 per year and that the estimated cost of operating the building was approximately $9,000 per year; in his estimated cost of operating the building at the present time, he included an item for fire insurance of such an amount as to represent insurance on the building for $100,000. The defendant's witness, Douglas, testified that at the time of the hearing the plaintiff had the building insured for $125,000. The defendant's expert witness, Rinn, testified that on March 2, 1934, no market existed in which the mortgaged property could be sold, that such a market had not existed since the early part of 1930, and that in his opinion the fair and reasonable value of the property as of the date of the sale or such nearest earlier date as there was any market value thereof, was $87,000, of which $45,000 was attributed to the land and $42,000 was attributed to the building. The assessed valuation of the property for the year 1934 was $85,000, for 1933, $90,000, for 1932, $117,000, for 1931, $122,000, 1930, $132,000 and for 1929, $135,000. The average annual net rental, after deducting taxes and operating expenses for the five years ending January 31, 1929, was $9,332.35.

> In my opinion the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there was any market value thereof, was $70,000."

This valuation of $70,000 exceeded the amount due under the judgment of foreclosure and sale. In confirming the Referee's report the Court denied any deficiency judgment. From this determination no appeal was taken by the appellant.

The following year, on March 20, 1935, the said foreclosure action was discontinued as against this appellee.

Although all of the foregoing details of the steps taken in the foreclosure action are not part of the record, the appellee believes that the allegations in the appellant's amended complaint (R. 11) wherein she refers to said action and the sale thereunder, and expressly alleges that she "duly" made a motion for a deficiency judgment therein, are sufficiently broad to permit of the foregoing more detailed references to the record of said foreclosure action.

In May, 1935, this action at bar, which is a separate and distinct action, was commenced in the New York Supreme Court, *Kings* County, against the appellee alone on the aforementioned collateral bond. The appellant sued herein for $57,969.34, plus interest from March 7, 1934, that being made up of the amount due on her mortgage, plus taxes and interest to the date of confirmation of the sale and plus foreclosure costs, less the $10,000 at which she bid in the property on the foreclosure sale and less the net rents collected by the receiver.

The complaint was thereafter amended and the appellee duly moved to dismiss the same on the ground that it did not state facts sufficient to constitute a cause of action. This motion, in effect a demurrer, was granted.

Summary of Appellee's Argument.

POINT I. The decision of the federal question now raised was not necessary or essential to the determination of the cause, and this Court should refuse jurisdiction and dismiss the appeal.

The amended complaint was dismissed, the Court holding that the Mortgage Moratorium laws applied (R. 15). It was dismissable under Chapter 794 by reason of this chapter having operated to release the mortgagor from a deficiency in the prior action to foreclose a mortgage.

It was also dismissable under the entirely separate and distinct Section 1078 of the Civil Practice Act, which was *not* part of the Mortgage Mortaorium Laws but had been a State Statute for many years, having been one of the Revised Statutes and a section of the Code of Civil Procedure long before it was incorporated into the Civil Practice Act. That section provided that before instituting an action such as the one at bar the appellant had to procure leave of the Court and the amended complaint fails to show such leave was procured.

POINT II. The federal question now urged by the appellant is not properly or timely urged, and this Court should refuse jurisdiction and dismiss the appeal.

The appellant as plaintiff in the foreclosure action had made the appellee a party defendant therein and asked for a deficiency judgment against him; she pursued all the advantages of the remedies afforded by this same Chapter 794 which she is now attacking and never questioned its constitutionality. Instead of attacking the constitutionality of the statute when she had the

right to do so, the appellant not only elected to proceed with her foreclosure during that short emergency period from August 26, 1933 to July 1, 1934, but in the judgment which she caused to be entered, expressly adopted Chapter 794, reserved her rights thereunder and willingly submitted to the procedure prescribed thereby by applying for a deficiency judgment pursuant thereto. By doing so she precluded the mortgagor from presenting on appeal the equitable defenses pleaded in its answer, and after she had procured the appointment of an Official Referee to determine the deficiency she willingly submitted her proofs before him, but she herself did not appeal when a deficiency was denied her. Evidently as an afterthought, a year later she proceeded with this second suit against the appellee on a theory calculated to defeat the deficiency judgment statute.

POINT III. The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

The appellee refers particularly to the decision of this Court in *Home Savings and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, sustaining the constitutionality of a similar Statute of Minnesota, and to the "rent cases", viz,— *Block* v. *Hirsch*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, and *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

POINT IV. Chapter 794 of the laws of 1933 of the State of New York is constitutional.

An emergency existed; the Legislation is within the police power of the State; it is addressed to a legitimate end, is appropriate, reasonable and only temporary. It is remedial in effect and does not impair the obligations of a contract.

POINT V. The instrument sued upon is very obviously a collateral bond and not a primary obligation as claimed by appellant.

The recitals and conditions of the bond itself ("Exhibit A", R. 12-15), which was on a printed form of a "Collateral Bond" readily shows this. It embodies no recital that the obligors were indebted to the obligees and recites that it was given as "further and additional security". The appellant and her attorney referred to this bond in the foreclosure action as the "Collateral Bond", but now endeavors to claim it was otherwise.

Argument.

POINT I.

The decision of the federal question now raised was not necessary or essential to the determination of the cause.

"If the challenged decision of a state court rests upon independent grounds not involving a Federal question and broad enough to maintain the judgment, the Supreme Court will dismiss an appeal from the state court without considering any federal question that also may have been presented" (Hughes Federal Practice, Sec. 3227).

People ex rel Doyle v. *Atwell,* 261 U. S. 590;
Eustis v. *Bolles,* 150 U. S. 361;
Dibble v. *Bellingham,* 163 U. S. 63;
Adams v. *Russell,* 229 U. S. 353, 358;
Cuyahoga v. *Northern,* 244 U. S. 300;
Richardson v. *Scott,* 276 U. S. 128;
Murdock v. *Memphis,* 20 Wall 590;
Chouteau v. *Gibson,* 111 U. S. 200.

And that has been the attitude of this Court even where the State Court has made a certification such as was

done in this case by the aforementioned amendment to the remittitur of the New York Court of Appeals.

Powell v. *Brunswick County*, 150 U. S. 433;
Parmelee v. *Lawrence*, 11 Wall (78 U. S.) (1870) 36;
Brown v. *Atwell*, 92 U. S. 327;
Adams County v. *Burlington*, 112 U. S. 123.

Regardless of the applicability of Chapter 794, the said amended complaint *was still dismissable* because of the provisions of Section 1078 of the Civil Practice Act, which is entirely separate and apart from the Mortgage Moratorium Laws and which provides:

> "ACTION FOR MORTGAGE DEBT SUBSEQUENT TO BEGINNING FORECLOSURE. While an action to foreclose a mortgage upon real property is pending *or after final judgment for the plaintiff therein*, no other action shall be commenced or maintained *to recover any part of the mortgage debt*, without leave of the court in which the former action was brought." (Italics supplied.)

There had been a final judgment in the foreclosure action, and this second action was commenced to recover part of the mortgage debt but the appellant's amended complaint contains no allegation that such leave of the court was procured, because, as a matter of fact, it has never been procured.

Such leave is part of the cause of action and must therefore be alleged, otherwise the complaint is demurrable (*Scofield* v. *Doscher* and *Robert* v. *Kidansky*, p. 12 *infra*, and *Farish* v. *Austin*, 25 Hun 430, *Freeman* v. *Dutcher*, 155 Abb. N. C. 431 and *Smith* v. *Britton*, 45 How. Pr. 428).

Leave to sue under this section is granted only in extraordinary and exceptional circumstances.

Matter of Byrne, 81 App. Div. 74;

United States Life Insurance Co. v. *Poillon,* 7 N. Y. Supp. 834;
Carlin v. *Lindtveit,* 175 App. Div. 940;
Hochstein v. *Schlanger,* 150 App. Div. 124, affd. 208 N. Y. 513.

The section applies to guarantees of payment of mortgages. *McKernan* v. *Robinson,* 84 N. Y. 105.

The purpose of the provision was to dispose of the entire proceeding in one action so as to avoid a multiplicity of suits.

Robert v. *Kidansky,* 111 App. Div. 475;
Equitable Life Assurance Society v. *Stevens,* 63 N. Y. 341;
Scofield v. *Doscher,* 72 N. Y. 491;
Stehl v. *Uris,* 210 App. Div. 445;
Darmstadt v. *Manson,* 144 App. Div. 249.

In *Stehl* v. *Uris* (*supra*) at page 449 the Court said:

> "Applications of this kind are necessarily addressed to the sound discretion of the court. *If the circumstances are of a character that render it inequitable to allow the deficiency judgment to be enforced,* then the court, being governed by principles of equity in granting or refusing such an application, should deny the same." (Italics ours.)

At the time of the entry of judgment of foreclosure and sale the appellee was a party to the action. The complaint demanded a deficiency judgment against him but as the action was still at issue as against him when the appellant entered her judgment of foreclosure, the said judgment made no provision for a deficiency judgment against him. The appellee was therefore released. *Tousey* v. *Barber,* 132 Misc. 861 (1928).

In this *Tousey* case one Isgar assumed payment of a mortgage. He was made a party defendant and a deficiency judgment demanded against him. The judg-

ment of foreclosure and sale did not provide for a deficiency against him. The sale was had pursuant to the judgment. A deficiency resulted. The referee certified that the defendant Isgar was liable therefor under said judgment and a judgment was entered against him. On motion to set aside the judgment and a counter motion to amend the judgment the Court said (at p. 863):

> "When the Barbers sold the mortgaged premises to the Isgars, and the latter promised and agreed to pay the mortgage and bond in question, the purchasers became, as between the parties, the principal debtors, and the sellers became the sureties. (*Paine* v. *Jones*, 76 N. Y. 274; *Calvo* v. *Davies*, 73 id. 211; *Wagoner* v. *Brady*, 221 App. Div. 405; *Hyde* v. *Miller*, 45 id. 396; *Dussault* v. *Wellman*, 130 Misc. 614.) That relationship survived the entry of this judgment. (*Wagoner* v. *Brady*, 221 App. Div. 405.)
>
> It is elementary that the liability of a surety ends with the extinguishment of the obligation of the principal. I think that the failure of the interlocutory decree to provide for a deficiency judgment against the Isgars, under all the circumstances disclosed here, amounts to an extinction of their debt.
>
> That judgment fixed the rights of the parties. All that remained to be done was to determine the amount of the deficiency for which the parties named therein, the sureties and not the principal, were to be liable. (*French* v. *French*, 107 App. Div. 107; appeal dismissed, 185 N. Y. 532.)
>
> The plaintiff could not have commenced or maintained another action against the Isgars to recover any part of the mortgage debt without leave of the court. (Civ. Prac. Act, §1078.)
>
> Such permission does not follow as a matter of course. Whether it should be granted or refused

depends entirely upon circumstances, and rests in the sound discretion of the court. (*Equitable Life Ins. Society* v. *Stevens*, 63 N. Y. 341; *Hochstein* v. *Schlanger*, 150 App. Div. 124; affd., 208 N. Y. 513; *Stehl* v. *Uris* 210 App. Div. 444; *Darmstadt* v. *Manson*, 144 id. 249.)

It was held in the *Hochstein* and *Stehl* cases (*supra*) that the court was justified in refusing to permit a plaintiff to bring a subsequent suit against one who was liable for the payment of the mortgage debt, but who had not been made a party defendant in a foreclosure action, upon the theory that it is the policy of the law to avoid, wherever possible, a multiplicity of actions, and to dispose of an entire proceeding in one suit."

At page 865 the Court went on to say:

"This is not a case where the creditor was unaware of the relation of principal and surety which existed between the Isgars and the Barbers. The deed, creating such relation, was a matter of public record, and plaintiff was charged with knowledge of its contents. That he had actual cognizance of the fact is evidenced by the allegations in his complaint, setting up this very situation.

The plaintiff recognizing the position in which he has found himself, has made a counter-motion, which I have permitted to come on for hearing at this time, in which he asks to amend the interlocutory judgment of foreclosure and sale *nunc pro tunc*, by inserting therein the names of the defendants George and Lena E. Isgar as parties liable for any deficiency upon the sale of said premises. If this can be done, so that the deficiency judgment can be entered against the Isgars as of the date of its original entry, the defendants Barber would not be released.

Ordinarily, a court has control over and authority to amend its judgments and orders. I think that

such rule is not applicable here. The liability of a surety once released cannot, as a general rule, be revived without his consent. Here, the sureties had a right to rely upon the interlocutory judgment of foreclosure and sale, as it was entered, and which did not provide for any judgment of deficiency against the principal debtors. Plaintiff proceeded to sell under that decree. The defendants Barber had no interest in the property, and, if no personal judgment could be entered against them, none in the sale; they might well have rested easy, ignored the sale, and refrained from bidding. To now permit the judgment to be amended as of the date it was granted, so as to provide for a judgment for deficiency against the Isgars, would be unjust and unfair. It cannot be done after the sale has taken place and has been confirmed. Plaintiff is too late. (*Baehr* v. *Smith*, 169 App. Div. 574; *U. S. Trust Co.* v. *Schliep*, 28 N. Y. Supp. 382; *Mutual Life Ins. Co.* v. *Hoyt*, 15 Wkly. Dig. 489.)"

In *Baehr* v. *Smith* (1915), 169 App. Div. 574, in an action to foreclose a mortgage which demanded a deficiency judgment against one Smith *the judgment failed* to provide for a deficiency against him. The property was sold and a deficiency resulted. After time to file exceptions and to appeal had run plaintiff made a motion to amend the judgment *nunc pro tunc* by inserting a provision for a deficiency judgment. The motion was granted. On appeal the Court reversed it and said (at p. 575):

"I am of the opinion that the order and judgment should be reversed and the motion to amend denied. The judgment, as entered, determined the rights of the parties. (*French* v. *French*, 107 App. Div. 107; app. dis., 185 N. Y. 532.) It made no provision for the recovery of any deficiency from the appellant, and for this reason there was no

necessity for her appealing from it, or attending the sale and protecting, as far as she could, her interest. After the property had been sold and bid in by the plaintiffs it was too late, under the facts here presented, for them to ask that the judgment be amended so that they might take a judgment against her for the deficiency.

The case is analogous to one where a mortgage has been foreclosed and the property sold does not bring sufficient to discharge the debt, and the holder of the mortgage seeks to recover the balance upon a bond. Such an action cannot be maintained without leave of the court (Code Civ. Proc. §1628), and special circumstances must be shown before such leave will be given. (*Equitable Life Ins. Society* v. *Stevens,* 63 N. Y. 341; *Hochstein* v. *Schlanger,* 150 App. Div. 124; affd., 208 N. Y. 513; *Morrison* v. *Slater,* 128 App. Div. 467.)

An authority much in point is *Darmstadt* v. *Manson* (144 App. Div. 249). There the plaintiffs brought an action for the foreclosure of a mortgage and asked in the complaint for a deficiency judgment, but the judgment entered made no provision for a deficiency. Some time after the sale of the mortgaged property, the plaintiffs applied for and obtained leave to bring an action on the bond for the deficiency. In reversing the order granting plaintiffs such leave, and denying the motion, the court said: 'The defendants * * * had no real or apparent interest in the sale of the premises, since the plaintiffs, by failing to proceed in the usual way, through no fault of the defendants, took the risk of selling under the judgment which they had procured. As this did not require the defendants to protect themselves against deficiency by bidding upon the property or otherwise, it would seem to be unjust to permit them now to come in and sue upon the bond. * * * The plaintiffs, by their own neglect, have placed the defendants in a dif-

ferent position from that they would have occupied two years before; in a position which the plaintiffs cannot, in the nature of things, restore, and having elected to stand upon their judgment and to sell the premises, it would be unjust to these defendants to permit this action.

In the case before us the plaintiffs, by amending the judgment after the sale, have accomplished the very thing which the court, in the case just cited refused to permit by an action on the bond. It would be unjust and inequitable, under the facts here presented, to permit the plaintiffs to enter a judgment for deficiency against the appellant. I think the court at Special Term improperly exercised its discretion in permitting such amendment'."

On the facts of the case at bar Chapter 794 of the Moratorium laws did not deprive appellant of any substantial or vested right which she had when she became owner of the collateral bond and the bond and mortgage which she foreclosed. She never had an absolute or vested right to bring an action on the collateral bond after judgment of foreclosure and sale. Mortgagees in the State of New York may choose to foreclose the mortgage and in the action join as parties all persons liable on the bond or guaranty of payment thereof and demand a deficiency judgment against them, or before bringing foreclosure sue on the bond. The appellant chose to foreclose her mortgage. She made the appellee a party to the action and demanded a deficiency judgment against him. After judgment of foreclosure and sale she discontinued her action against him. Having proceeded to judgment of foreclosure and sale she subjected herself to the provisions of Section 1078 of the Civil Practice Act which required her to apply to the Court for leave to bring the present action. Such permission would not be granted unless she showed extraordinary and exceptional circumstances. The general rule

of the courts of New York is to deny such applications. *Scofield* v. *Doscher*, 72 N. Y. 491; *Darmstadt* v. *Manson*, 144 App. Div. 249. In this case the Court said at page 251:

> "It has been universally held that Section 1628 of the Code of Civil Procedure confers no absolute right upon a plaintiff to sue separately after a foreclosure, a person liable for the mortgage debt and who might have been made a party to the foreclosure action, but that the right to do so should be granted only when satisfactory reasons are shown why the personal liability was not prosecuted in the foreclosure suit itself. It was pointed out by Judge Rapallo in *Equitable Life Ins. Society* v. *Stevens* (63 N. Y. 341, 345) that under the Revised Statutes (2 R. S. 191, §153), which are now contained in the Code of Civil Procedure (§1628), 'so far * * * from its being made compulsory on the court to grant such permission in all cases, the general rule was against it, and special circumstances must be shown to justify a separate proceeding at law.' And in *Scofield* v. *Doscher* (72 N. Y. 491) it was said that the 'aim of the statute is to dispose of the matter in one proceeding'."

The amended complaint does not allege the invasion of any constitutional rights of appellant. She had none under the facts presented. Mortgagees in the State of New York never had any absolute, unqualified or vested right to sue on a collateral bond or guaranty of payment of a mortgage after judgment of foreclosure and sale had been entered.

In the case at bar no Court of Equity would grant such permission. The application would shock the conscience of any court because the facts would show that appellant purchased for $10,000 at the foreclosure sale a valuable parcel of real property once mortgaged for

$118,000 in payment of a debt of $60,000 plus interest, and was attempting to obtain in addition a personal judgment for the balance against the appellee.

It will readily be seen that it is unnecessary to pass upon the constitutionality of the law as applicable to the facts of the case at bar, because the amended complaint fails to allege that leave to bring the action was obtained, and also because no substantial legal right of appellant was taken away from her by the act in question. She never had any vested legal right to bring the action.

The lower court therefore had ample authority to dismiss the amended complaint under Section 1078 of the Civil Practice Act and it follows that the decision of the State Court as to the constitutionality of Chapter 794 was not necessary to the judgment that was rendered, and therefore no Federal question is presented.

POINT II.

The Federal question now urged by the appellant is not properly or timely urged.

The record of the foreclosure action shows that this appellant as plaintiff therein, availed herself of all the advantages of the remedies afforded by Chapter 794, the constitutionality of which she now attacks.

In the affidavit of Robert B. Honeyman, her present attorney, verified November 24, 1933, and filed on her motion therein to strike out this appellee's answer and for summary judgment, he stated in part:

> "That part of defendant's answer and amended answer which seeks to avoid a deficiency judgment in the event of the sale of the mortgaged premises and to compel the plaintiff to bid a definite sum for the same has no foundation in law. It is not pos-

sible to determine in advance of the sale what price the premises will bring and it is only after the Referee's Report is filed that the Court can, in accordance with the provisions of Chapter 794 of the Laws of 1933, pass upon the plaintiff's right to a deficiency judgment."

In the memorandum filed on December 11, 1933, by the appellant on the motion to strike out the answers of the defendants, it is stated at pages 2 and 3 thereof:

"The defendant John H. Hanan Realty Co. has no defense to this action and freely admits its default in the payment of interest and taxes on the mortgaged premises. It joins, however, with the other defendant in an endeavor to save the latter from a possible deficiency judgment.

Defendants' attorney apparently has not read Chapter 794 of the Laws of 1933, which help his client in this case to the extent that it provides that the Court shall determine the fair and reasonable market value of the premises permitting a deficiency judgment only for the difference, if any, between said value and the amount of the indebtedness, if the latter figures exceed the former.

Said defense is wholly premature and unnecessary. The estate must receive notice of the application for a deficiency judgment, and upon the hearing or reference will have ample opportunity to prove the assertion that the premises are worth $80,000."

Appellant not only failed to question the constitutionality of Chapter 794 in that action, but entered a judgment therein pursuant to the terms and provisions thereof and expressly referred to it therein (p. , *supra*). She proceeded to sell the property and bought it in herself; she then "duly" made a motion for the deficiency against the John H. Hanan Realty Co.; such application was referred to an Official Referee and on the hear-

ing before him she produced her proofs as to what she considered to be the fair and reasonable market value of the property. The Referee determined the market value thereof to be $70,000, which was greater than the amount due on the mortgage, and his report was confirmed by the Court, and the application for a deficiency judgment was thereupon denied.

The plaintiff took no appeal from that order of confirmation which she entered herself, nor from any other order or judgment in that foreclosure action; but waited a year and then started this action at bar in May, 1935.

The point which the appellee makes is that it was *in that foreclosure action* that the appellant should have raised any question of the constitutionality of Chapter 794. If her rights were unconstitutionally impaired by such chapter, such impairment occurred *then*. The appellant, having failed to urge unconstitutionality in that action, is precluded from doing so in this action and is precluded on this appeal.

6 Ruling Case Law, Secs. 95 and 96:

> "The rule is now generally recognized that one who invokes the provisions of a law may be denied the right to question its constitutionality, and cannot even in subsequent litigation aver its unconstitutionality as a defense.
>
> "Where a complaint is made that an act of the legislature or of an administrative board contravenes a constitutional right, the general rule is that it is the duty of the person whose rights are thus invaded to raise the objection at the earliest available opportunity and to exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute. The failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right."

Ross v. *Lipscomb,* 83 S. C. 136, 65 S. E. 451;
Kansas City R. R. v. *Stiles,* 242 U. S. 111;
Wall v. *Parrot Silver & Copper Co.* (1917), 244 U. S. 407;
Beaupre v. *Noyes,* 138 U. S. 397;
Electric Co. v. *Dow,* 166 U. S. 489.

In *Wall* v. *Parrot Silver and Copper Co., supra,* the appellants were large stockholders of the appellee corporation. Under statutes of Montana a corporation could sell all its assets upon consent of two-thirds of the stockholders. The sale of the assets of the appellee corporation was made pursuant to said statutes. The statutes further provided that any stockholder dissenting could serve notice to that effect and have the value of his stock fixed by three appraisers and if that appraisal was not satisfactory appeal could be taken to a court and the value there reassessed by a jury. After the sale in question these appellants served notice of dissent and commenced statutory proceedings for the appraisal of their stock. While those proceedings were pending they came before the Supreme Court by direct appeal claiming the said statutes were unconstitutional.

In affirming the decision of the District Court the court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes which is still pending, waived their rights to assail the validity of them. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Leonard*

> v. *Vicksburg, Shreveport & Pacific R. R. Co.,* 198 U. S. 416, 422. They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be."

In *Electric Co.* v. *Dow,* 166 U. S. 489, it was held that a party by taking advantage of a statute of New Hampshire, and joining in a trial for the assessment of damages pursuant thereto was precluded from denying the validity of the statute, as the said party was at liberty to exercise the privilege or not as he saw fit.

In *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, appellant sought a temporary injunction restraining the Virginia Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment. He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that the proposed action would deprive him of property without due process of law contrary to the 14th Amendment. The court said:

> "A majority of the three judges composing the Court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights of property appellant claimed in respect of the specified lands or the oysters thereon, were necessarily based on the statute itself and that he could not both assail it, and rely upon it in the same proceeding. *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles,* 242 U. S. 111, 117."

In the foreclosure action the appellee in his answer pleaded the existence of the emergency and the equitable powers of the court to prevent an unjust enrichment. He was prepared to have these powers determined on appeal if such a course should be necessary. The appellant by adopting the procedure provided in Chapter 794 for a deficiency judgment precluded both herself and the appellee from obtaining a determination of the powers of the court of equity under the circumstances.

The Appellate Division of the New York Supreme Court in the Second Department strongly maintained that such powers exist in adequate measure regardless of any statute (*Monaghan* v. *May*, 242 App. Div. 64, and *Guaranteed Title and Mortgage Co.* v. *Scheffres*, 247 App. Div. 294).

Moreover by attempting to obtain a deficiency judgment against the mortgagor in the foreclosure action before her rights against the appellee were determined, the appellant not only released the appellee (*Tousey* v. *Isgar*, p. 12, *supra*), but estopped herself from raising the question of the constitutionality in a subsequent and separate action.

If the appellee should be held liable in this action on the grounds of unconstitutionality he could not recover from the mortgagor because the obligation sued upon by its terms is void if the mortgage has been discharged and the failure of the appellant to raise the question of constitutionality in the foreclosure action operated to discharge the mortgage.

Furthermore, even in the present action the amended complaint does not allege unconstitutionality and in opposing the motion to dismiss at Special Term the appellant made no claim that she was the victim of any unconstitutional statute. It was not until the cause reached the Appellate Division of the Supreme Court

that the appellant complained about the statute being unconstitutional.

It is therefore submitted that even if Chapter 794 is unconstitutional the appellant cannot in this action take advantage of that fact.

POINT III.

The decision of the State Court on the question raised is in express harmony with the uniform decisions of this Court.

The Mortgage Moratorium laws of New York are well within the doctrines established by the decisions of this Court as laid down in the *Blaisdell* case and the "Rent cases".

The Collateral argument on this point is made under Point IV, *infra*.

POINT IV.

Chapter 794 of the Laws of 1933 of the State of New York is constitutional.

It is submitted that any legislation conforming to the essential criteria established by the decisions of this Court and laid down in the *Blaisdell* case constitutes a proper exercise of the state police power. In that decision these criteria were set forth at pages 444-447 as follows:

> 1. **"An emergency existed * * * which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."**
>
> 2. **"The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."**

3. "In view of the nature of the contracts in question—mortgages of unquestionable validity— the relief afforded and justified by the emergency, in order not to contravene the constitutional provision could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."

4. "The conditions upon which the period of redemption is extended do not appear to be unreasonable, being based upon equitable principles as determined by the Court in its discretion."

5. "The legislation is temporary."

1. The Emergency.

The appellee anticipates that the briefs to be filed by the Attorney General of the State of New York and by counsel to the Real Estate Board of New York, *amici curiae,* will go deeply into the details and statistics of the plight with which real estate owners were confronted before the passage of these laws, and of their appropriateness as proven by the improvements resulting therefrom.

However, it is a matter of common knowledge, of which this Court will take judicial notice, that from 1932 and throughout the years 1933 and 1934 a great economic emergency of unparallelled magnitude existed and continued. It was state, nation and world wide; unemployment prevailed; men were starving and homeless; millions were on relief; fortunes were wiped out; banks failed; industry was at a standstill; loans from bank and other loaning institutions could not be had; many lost their homes and farms. There was great deflation in all kinds of securities, especially real estate securities; defaults in payment of interest and taxes on property were very numerous; liquidation in all kinds of securities occurred; many breaches of the peace occurred in many parts of the country where

mortgage holders attempted to enforce their legal remedies. People were driven to desperation, mob violence and riots occurred in many parts of the country. The Federal and State governments passed many relief measures. The peace of the country was seriously threatened.

In New York billions of dollars were invested in real estate securities by citizens from all parts of the country through mortgage guarantee companies. Most, if not all, of these companies were in the hands of the Insurance Department of the State in liquidation. Banks refused to make loans on the best of real estate securities or any other kind of security. Value was in real estate but the value could not be obtained. There was no market of any kind in real estate. Free liquidation in real estate securities would necessarily result in widespread ruin to real estate owners. Of these conditions the New York Court of Appeals took judicial notice in *Klinke* v. *Samuels* (*infra*), and in the case of *Matter of the People* (*Title & Mortgage Guarantee Co.*), 264 N. Y. 69 where the said Court said (at p. 85):

> "Owing to a sudden change in economic conditions many owners of real estate are unable at the present time to meet the obligations of the mortgages on their property. Defaults are numerous and immediate liquidation of a substantial amount of these mortgages through foreclosure or other court proceedings 'would so demoralize the general real estate market that there might be realized on such bonds, mortgages or other security substantially less than the face amount thereof and substantially less than what would be realized if they were disposed of in an orderly manner over a reasonable period of time.' Free liquidation now of such obligations would result 'in such unprecedented demands upon the resources of the guaranty

corporations that their resources would be sufficient to pay only a relatively small portion of such demands.'

It cannot be doubted that the free liquidation of great amounts of indebtedness secured by mortgages would result in widespread ruin to real estate owners and in probable widespread damage to investors. That situation affects the economic welfare of the community and affects the vital interests of the community. Legislation intended to relieve that situation is directed towards a legitimate end."

The Legislature of the State, with these conditions confronting it, exercised its reserved power and enacted the so called Mortgage Moratorium Laws in order to prevent riots, breaches of the peace, and to promote the general welfare of its citizens during the economic crisis. The laws were directed to a legitimate end and purpose. They were temporary measures to last only during the emergency which the Legislature then estimated would last until July 1, 1934.

Appellant does not contend an emergency did not exist or that it had ceased at the time she foreclosed her mortgage. That it existed at that time and continued for a long time thereafter are historical facts of which this Court will take judicial notice. Further, there is the legislative declaration that it existed during all of 1934.

Section 1 of Chapter 794 provides:

"It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other

adverse conditions, exists. Therefore in the public interest the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination."

This Court has held that such a declaration, while subject to judicial review, is always entitled to the greatest respect (*Block* v. *Hirsh* (1921), 256 U. S. 135, 154) and stated in the *Blaisdell* case (at p. 444):

> "The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block* v. *Hirsh, supra.* The finding of the legislature and state court has support in the facts of which we take judicial notice. *Atchison T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248, 260."

There can be no doubt that the emergency which existed in Minnesota was no different than that which existed in New York, except that the condition in New York was more acute by reason of there being a greater number of parcels of real estate and therefore a greater number of mortgages and foreclosures. (See excerpt from decision of Court of Appeals in *Klinke* v. *Samuels, infra.*)

In the *Atchison* case, *supra,* this Court said (at p. 260):

> "There can be no question as to the change of conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact dominating thought and action throughout the country. As the Interstate Commerce Commission said in its

recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation'."

The New York Court of Appeals has in many decisions sustained the validity of these laws as within the reserve powers of the state. It also took judicial notice of the emergency, and held that the said laws protected guarantors of mortgages.

Klinke v. *Samuels* (1934), 264 N. Y. 144;
City Bank v. *Ardlea,* 267 N. Y. 224;
Kramer v. *Relgov,* 268 N. Y. 592;
McCarty v. *Prudence Bonds* (1933), 149 Misc. Sup. Ct. (N. Y. Co.) 13, 14.

In the *Matter of Application of People of the State of New York,* 264 N. Y. 69, which upheld the constitutionality of another emergency statute, known as the Schackno Act, the Court at page 94 said:

"Extra-ordinary conditions may call for extra-ordinary remedies. Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the reserved power of the State and whether the remedy adopted by the state is reasonable and legitimate. An individual may not justly complain of a reasonable legislative invasion of his usual rights or a reasonable legislative restriction of his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community."

And at page 97 said:

"We find that economic conditions create an immediate danger to the economic welfare and the vital interests of the community. We find the Legislature in the exercise of its reserved power has adopted a remedy which is reasonably calcu-

lated to meet such conditions. No impairment of contract which results will substantially injure any person. The statute merely furnishes a shield against unreasonable attack on the vital interests of the community and an additional remedy for enforcement of obligations in manner fair to all."

The police power of the state is vested in the Legislature which has the duty and responsibility of determining if and when the emergency exists and how it will be met. Such power extends to the preservation of peace and maintaining good order throughout the state and to the protection of the property of its citizens and their general welfare, comfort and convenience. Everything necessary for the protection, safety and best interests of the people may be done under this power and in its exercise, persons and property may be subjected to all reasonable restraints and burdens for the common good for it is within the general powers of a government to preserve and promote the general welfare even at the expense of private rights and every owner of property holds the same subject to this power.

Patterson v. *Kentucky,* 97 U. S. 501;
Barbier v. *Connolly,* 113 U. S. 27;
Hannibel v. *Husen,* 195 U. S. 465;
Mugler v. *Kansas,* 123 U. S. 623;
Atkin v. *Kansas,* 191 U. S. 207;
Jacobson v. *Massachusetts,* 197 U. S. 11;
People v. *La Fetra,* 230 N. Y. 429;
Gutag v. *Schatzkin,* 230 N. Y. 647.

2. A Legitimate End.

Under the Tenth Amendment to the United States Constitution the police power is reserved to the States. Accordingly, the provisions of the Constitution as to

the impairment of the obligation of contracts are subject to this reserved police power of the States. Justice Kellogg in *Sliosberg* v. *N. Y. Life Ins. Co.* (1927), 244 482, cert. den. (1927), 275 U. S. 526, pointed out, at page 497:

> "* * * That the government may be required, in times of public stress, so to legislate as to nullify private contracts is an implied term of the law of every contract, so that such legislation, if enacted, does not impair the obligation of the contract within the meaning of the limitation. * * *"

The relation of contract rights to State police power was discussed by Mr. Justice Holmes in *Marcus Brown Holding Co.* v. *Feldman* (1921), 256 U. S. 170, as follows, at page 198:

> "* * * But contracts are made subject to this exercise of the (police) power of the State when otherwise justified, as we have held this to be. * * *"

In the *Feldman* case this Court had before it the statutes of New York, Laws of 1920, Chs. 942-947, 951, declaring that a public emergency existed, directly interfering with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the City of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels) were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances), providing the tenants or occupants were ready, able and willing to pay a reasonable rent or price for their use and occupation.

In the case of *Block* v. *Hirsch,* 265 U. S. 135, which was also one of the "rent cases" this Court said at page 155:

> "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; irrigation in *Clark* v. *Nash,* 198 U. S. 361; and mining in *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mount Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 30, 32 and that the public interest may extend to the use of land. They dispell the notion that what may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110, 111."

In the *McCarty* case, *supra,* which involved the statute in question, the Court (Untermyer, *J.*), referred to the "rent cases" and stated at page 15:

> "In those cases the Courts sustained statutes enacted on account of a shortage in housing facilities, which allowed the tenant to remain in possession of premises after the expiration of the lease, upon payment of reasonable rent, notwithstanding an express covenant on his part to surrender possession at the expiration of the term. The right of a landlord to recover possession of his property from

a tenant whose lease had expired and the contractual obligation of the tenant to surrender the premises at the end of the term were held to be subject to the police power of the state when circumstances had clothed the renting of dwellings with a public interest. That which is true of land is true of money in a critical period of financial disturbance."

The Court sustained the validity of the above Emergency Rent Act and similar legislation in the District of Columbia, predicating its conclusion on the findings that—

1. An emergency existed and warranted the exercise of the latent police power of the State;

2. The housing business became affected with a public interest as the result of such emergency;

3. The legislation was temporary in character, being limited to a period of two years; and

4. The landlord was compensated, at least in part, to the extent of receiving a reasonable rental (*cf.* 290 U. S. 398, 441-442).

It will be noted that all of these elements are present in the Minnesota and New York moratorium legislation.

1. Thus the Minnesota law of 1933 (Ch. 339, Part One, sec. 1) declares the existence of an economic emergency. A similar declaration is found in New York L. 1933, Ch. 793, Sec. 1, and Chapter 794, Sec. 1.

2. As pointed out in *Block* v. *Hirsh, supra* (p. 155), a business which is ordinarily purely private, such as housing, may become affected with a public interest during an emergency. Undoubtedly such was the case with the real estate mortgage business during the present depression.

3. The Minnesota and New York laws originally expired in 1935 and 1934, respectively. This period has been advanced in both cases to 1937.

4. Finally, both the Minnesota law (Part One, Section 4) and C. P. A., Section 1077-a, *et seq.*, provide adequate compensation for the temporary suspension of the mortgagee's remedies.

This Court cited with approval the rent cases in upholding the Minnesota Moratorium Law in the following language of Mr. Chief Justice Hughes in the *Blaisdell* case (at p. 444):

> "* * * The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases."

Nor is there any greater reason for refusing to apply this principle to New York mortgages than to New York leases.

3 & 4. Appropriateness and Reasonableness.

The Minnesota statute, known as Chapter 339 of Laws of 1933 which became a law on April 18th, 1933 provided (Sec. 4) that during the two years following the passage of the act in any foreclosure action where the period of redemption had not expired, the period of redemption could be extended by the Court

> "for such additional time as the Court may deem just and equitable but in no event beyond May 1, 1935; provided that the mortgagor or the owner in possession * * * shall prior to the expiration of the period of redemption, apply * * * for an order determining the reasonable value of the income on said property, or, if the property has no

income then the reasonable rental value * * * and directing and requiring such mortgagor * * * to pay all or a reasonable part of such income or rental value" etc.

And said section further provides:

"Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this act has expired."

As to the appropriateness and reasonableness of the Minnesota statute, Mr. Chief Justice Hughes said, at page 445:

"As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee purchaser to title and to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he may pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession."

Under the New York statute, therefore, the same rights are preserved. And *in addition* the mortgagee under Chapter 793 (Sec. 1077-c of C. P. A.) has the right, where the income *is more* than enough to pay the carrying charges and interest, to have that balance

applied on account of any past due principal. This is a privilege which the mortgagee does not have under the Minnesota statute.

All that Chapter 794 of the act does is to require, in actions brought during the ten month emergency period, that the Court determine "the fair and reasonable market value" of the mortgaged premises and deduct that from the amount due in determining the deficiency instead of deducting the amount bid which is very often only a nominal amount determined solely by the mortgagee, as in the case at bar. Even during such emergency period the right to a deficiency is not suspended. The mortgagee may still obtain a deficiency judgment for any amount by which the principal debt, plus interest and costs, exceeds this "fair and reasonable market value of the property."

The Court of Appeals of New York in construing this section of the statute as to how this value is to be determined has said in *Heiman* v. *Bishop*, 272 N. Y. 83, at pages 86, 87:

> "Prior to the depression, the method of determining the market value of real property was fairly well established by the decisions of the courts. In a general way, the market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell.
>
> It is to be noted that in the various definitions of market value of real property stated by the courts there appears the words 'under ordinary conditions' or 'under ordinary circumstances' or words of like import. Certainly, during the depression, ordinary conditions have not existed in the real property market. Conditions in that market have been extraordinary and unprecedented. The Legislature when it enacted section 1083-a understood

those conditions and it was because of such conditions that the section was enacted. Nevertheless, the section requires the court to determine the market value of the premises. In the depressed condition of the market for real property, the old standard of market value has become utterly useless. The new and unusual conditions necessarily required a new standard for determining value, otherwise the section would have the effect of depriving mortgagees of deficiency judgments in practically all cases. That certainly could not have been the intent of the Legislature."

And at page 88:

"In a proceeding under section 1083-a, the court should receive evidence of the age and construction of the buildings on the premises, the rent received therefor, assessed value, location, condition of repair, the sale price of property of a similar nature in the neighborhood, conditions in the neighborhood which affect the value of property therein, accessibility and of all other elements which may be fairly considered as affecting the market value of real property in a given neighborhood. With such evidence before it, the trial court, in the exercise of its best judgment, should determine the market value of the premises in the existing circumstances."

The Act Merely Puts Into Effect at a Time of Great Economic Stress Equitable Principles Which Have Long Been Recognized in the Foreclosure of Mortgages.

Courts of equity have always had the power to impose conditions upon the purchase by the mortgagee at a foreclosure sale. In the earlier cases he was considered a quasi-trustee and was ineligible to purchase property on foreclosure (Jones on Mortgages Secs. 1614-a, 1635). Recognizing that this often worked hardship on a mortgagee the courts developed the practice

of allowing the mortgagee to purchase and in the United States by statute, judicial construction or customary permission this restriction was largely removed.

In 1849 a rule of practice was adopted in New York which has developed into the present Rule 259 of the Rules of Civil Practice which reads:

> "*Unless otherwise specially ordered* by the court, the judgment should direct * * * that the plaintiff or any other party may become a purchaser at such sale." (Italics ours.)

In the case at bar the appellant, as plaintiff, was permitted by the judgment prepared by her in her foreclosure action to buy in and she did buy in at the sale.

It stands to reason that the lack of competition at foreclosure sales during the depression has been due in some part to the privilege accorded the mortgagee to buy in. Seldom is there more than one bid and then only by some subordinate lienor hoping to protect his lien. Prospective buyers know that the mortgagee can bid up to the value of his debt without having to make any outlay of cash; realizing for this reason it is impossible to purchase the property at a price less than the mortgage debt, persons who might otherwise become buyers avoid foreclosure sales.

Since the possibility of a double recovery arises from the privilege of purchasing accorded to the mortgagee, as actually exists in the case at bar, a court of equity would certainly have the power to protect the mortgagor by imposing reasonable conditions upon the exercise of such privilege such as the conditions imposed by this statute which is now attacked. The power is expressly reserved to the court by this rule 259.

The basis of such relief is historical surviving in this current rule of practice. It cannot be questioned as unconstitutional because the right of a court to deny a

mortgagee the privilege of purchasing at the sale antedates any mortgage that might now come up for foreclosure.

In New Jersey, mortgage moratorium statutes were held invalid because not limited to the period of an emergency (*Vanderbilt* v. *Brunton,* p. 53 *infra*). At the same time, however, the Law and Chancery courts sustained the inherent power of equity to protect borrowers from undue exactions of lenders seeking deficiency judgments. In doing so they took judicial notice of economic conditions and determined, as the cases were presented, the beginning, extent and duration of the depression and its effect on forced sales of real estate; in other words, the period during which emergency conditions may be said to exist which justify the exercise of inherent equity power.

In *Federal Title, etc., Guaranty Co.* v. *Lowenstein* (113 N. J. Eq. 200; 166 A. 538), decided May 9, 1933, the historical phase in respect of inherent power is developed at length at pages 207-209, by Vice Chancellor Berry and concurred in by Vice Chancellors Backes and Stein.

In *Young* v. *Weber* (117 N. J. Eq. 242; 175 A. 273), Vice Chancellor Berry (Nov. 10, 1934) re-examined the historical basis for sustaining inherent equity jurisdiction to refuse, where in equity and good conscience it should, a deficiency judgment. This opinion was concurred in by all the Vice Chancellors and the Chancellor, that is, the entire Chancery Bench of the State of New Jersey. He there pointed out that exercising that jurisdiction was an enforcement in part of the ancient equitable maxim, "equity will not suffer a double satisfaction to be taken", and he quoted with approval from an earlier case in which Backes, V. C., wrote: "Satisfaction of the debt and not pillage of the debtor's estate

is equity's relief." To the same effect is *Better Plan B. & L. Assn.* v. *Holden* (114 N. J. Eq. 537; 169 A. 289).

In Wisconsin that equitable doctrine has also been invoked (*Suring State Bank* v. *Giese,* 210 Wisc. 489).

New York courts have evinced a similar tendency (*Monaghan* v. *May,* 242 App. Div. 64; and *Guaranteed Title and Mortgage Co.* v. *Scheffres,* 247 App. Div. 294). In *Emigrant Industrial Savings Bank* v. *Bokkelen,* 269 N. Y. 110, the Court of Appeals indicated that the question was still open and evidently to avoid any misunderstanding said it was not approving the decision in the *Monaghan* case. On the other hand it did not reject it.

It was obviously to such powers of courts of equity to which Mr. Justice Hughes made reference in his opinion in the *Blaisdell* case when he said at page 446:

> "In the absence of legislation Courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience."

It would be difficult to find a better example of "inadequacy of price" and unjust enrichment than in the case at bar. Here was a piece of property comprising a seven story loft building on a corner, with a frontage of 90 feet on one street and 63 feet on another bought in by the appellant for $10,000 when it was appraised for tax purposes at $85,000. She does not ask for a judgment for the difference between the amount due on her mortgage and the $45,000 which she conceded, through her expert witness, the property was worth when she bid it in (*supra,* p. 6), but she asks for judgment for the difference between the amount due on her mortgage and the $10,000 at which she bid in the property.

A court of equity would readily refuse such a demand as unconscionable even if there was no such emergency statute. The statute preserves to the mortgagee the right to the same deficiency judgment to which she would have been entitled in normal times and the right of payment of her *real* mortgage debt in full, but it also tends to avoid unjust enrichment to a mortgagee at the expense of the mortgagor as this appellant now seeks.

The Statute Here Regulates the Remedy and the Mode of Procedure Only for the Enforcement of the Obligation and Does Not Impair the Obligation Itself.

Mr. Justice Hughes in the *Blaisdell* case at page 433, referring to the control of the state over remedial processes quoting from an earlier case (*Penniman's* case, 103 U. S. 714, 720), said:

> "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

This act is not in derogation of substantial contractual rights. It merely establishes, as a temporary expedient, during a period of great economic stress, a change in the method of procedure to collect a mortgage debt.

5. The Legislation Is Temporary.

> "It is limited to the exigency which called it forth" (*Blaisdell* case, *supra*, p. 447).

The statute expressly defined and limited the period of emergency to be from the date of its enactment, August 26th, 1933 to July 1st, 1934, a period of ten months and five days.

The New York Court of Appeals in *Klinke* v. *Samuels, supra,* at page 149 said:

> "As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering, the Legislature had asked through these laws, for security holders to wait a reasonable time for universal economic conditions to improve, provided interest and taxes are paid.
>
> After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.
>
> That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People (Title & Mortgage Guarantee Co. of Buffalo)* (264 N. Y. 69), and *Home Building & Loan Assn.* v. *Blaisdell* (290 U. S. 398)."

The requirement of temporary operation is thus fully satisfied so as to comply with the observation of Mr. Justice Holmes in *Block* v. *Hirsh, supra,* at page 157 of 256 U. S. that:

> "A limit in time, to ride over a passing trouble, may well justify a law that could not be upheld as a permanent change."

At page 4 of her brief and in the Appendix to her brief the appellant mentions the extensions of this legislation enacted since 1934. However, this Court is not

concerned here with those extensions or their reasonableness because the appellants foreclosure action hereinbefore referred to was instituted and completed before the expiration of the original emergency period provided for, viz,—August 26, 1933 to July 1, 1934.

The Appellant's Contract Has Not Been Materially Impaired.

Appellant complains under Point II of her brief that Chapter 794, if applicable to the collateral bond, materially impairs her contract rights.

The appellee submits:

1. Appellant's contract was impliedly subject to the possible future exercise of the State police power for legitimate ends. (*Home Bldg. & Loan Assn.* v. *Blaisdell, supra,* 439; *Marcus Brown Holding Co.* v. *Feldman, supra,* 198.)

2. Appellant had no vested right in the then existing remedies for breach of her contract. The Legislature was authorized to change them.

See *Waggoner* v. *Flack* (1903), 188 U.S. 595, 602:

> "* * * It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

Oshkosh Waterworks Co. v. *Oshkosh* (1903), 187 U. S. 437, 439:

> "* * * But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract * * *."

3. She had no absolute vested right to sue on the collateral bond. It was subject to leave of the Court as provided in Section 1078 of the Civil Practice Act which the Court had power to refuse.

The appellant also argues that since the interest and taxes were in default she had no choice but to foreclose and take over the property. That is not so. The Legislature gave her the choice of waiting until July 1, 1934, the date when it estimated the emergency would be over, or of foreclosing her mortgage before that time and submitting to the court the question of how much of a deficiency judgment, if any, she was entitled to. She chose the latter method without any complaint.

Instead of waiting this appellant evidenced every desire to take over the mortgaged premises as quickly as possible. She commenced her action on September 22nd, 1933, and bought in the property on March 2nd, 1934.

The appellant also complains that prior to the enactment of this statute the appellant was entitled to a deficiency judgment as a matter of course. That is not so. Courts of other states have held to the contrary (*Federal Title Co.* v. *Lowenstein* (N. J.), p. 40, *supra*; *Young* v. *Weber* (N. J.), p. 40, *supra*; *Better Plan B. & L. Assn.* v. *Holden*, p. 41, *supra*; *Suring State Bank* v. *Giese* (Wis.), p. 41, *supra*; *Beaver County*

Bldg. and Loan Assn. v. *Winovich* (Pa.), p. 18 of Appellant's Brief) and courts of New York have approved the doctrine (*Monaghan* v. *May,* and *Guaranteed Title & Mortgage Co.* v. *Scheffres,* p. 41, *supra*).

Further the appellant has no cause for complaint. She never applied for a deficiency judgment as a matter of right but instead she voluntarily applied for a deficiency judgment pursuant to the procedure prescribed by Chapter 794. Appellant was not entitled to such a judgment as a matter of course. An action to foreclose a mortgage is one in equity and by submitting to the jurisdiction of a Court of equity she subjected herself to all rules of equity. Sales on foreclosure are subject to confirmation by the Court and may be set aside for inadequacy of price. *Land Finance Corporation* v. *Giorgio, Jr.,* 235 App. Div. 627. Leave to sell under a judgment may be withheld in abnormal times unless there is reasonable assurance of competitive bidding: *Bank of Manhattan* v. *Ellda,* 147 Misc. 374. Courts of equity may mold their relief and remedies to meet the conditions with which they have to deal.

Further, if appellant had a right to a deficiency judgment as a matter of course she waived it by voluntarily submitting to the procedure prescribed by said Chapter 794. She cannot avail herself of the provisions of the Act and when she finds that the Court decided against her, not appeal from the decision and bring a separate action to recover what was denied her. The orderly administration of justice required her to appeal and thereby directly present the question of unconstitutionality of said chapter. As now presented to this Court, even if it should hold it unconstitutional, appellant still has no cause of action because she did not procure leave to sue pursuant to Section 1078 of the Civil Practice Act, which leave would be denied to her as hereinbefore pointed out.

When this statute, passed to tide over such emergency, gave the mortgagee the right to a deficiency judgment for the difference between the amount due and the "fair and reasonable market value" (as determined under the procedure laid down in the Court of Appeals decision of *Heiman* v. *Bishop, supra*) it preserved to the appellant the same rights which she had in normal times and took nothing from her.

The Provisions of Chapter 794 of the Laws of 1933 Do Not Impair the Obligations of Appellant's Contract and Do Not Violate the Constitutional Prohibition Upon Such Legislation, as Claimed by the Appellant.

Under appellant's Point III she urges that this statute violates Article 1, Section 10 of the Constitution and cites a number of decisions by this Court all the doctrines of which were considered, mentioned and distinguished in the *Blaisdell* case. Mr. Justice Hughes saying (p. 434):

> "None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. * * *".

The appellant argues that the principle stated in the *Blaisdell* case "has been materially clarified" by subsequent decisions of this Court in the cases of *W. B. Worthern Co.* v. *Thomas, W. B. Worthern Co.* v. *Kavanaugh,* and *Louisville Bank* v. *Radford.*

The appellee submits that the New York Moratorium laws are not open to the same objections which caused

this Court in the two *Worthern* cases *supra* to invalidate the two Arkansas statutes providing respectively for a mortgage moratorium without compensation to the mortgagee and for the unlimited, absolute and retroactive exemption of life insurance from garnishment. Unlike the New York Moratorium Law, these Arkansas statutes did not contemplate a mere temporary suspension of remedies upon reasonable terms. Instead, they effected the complete destruction of the creditor's rights without compensation to him in any form. As was pointed out in the *Kavanaugh* case by Mr. Justice Cardozo, at page 61 of 295 U. S.:

> "* * * The case is one of postponement for a term of many years with undisturbed possession for the debtor and without a dollar for the creditor. * * *"

In discussing the utter lack of compensation afforded to the creditor, this Court said in part, at page 61:

> "* * * Relief is not conditioned upon payment of interest and taxes or the rental value of the premises. * * *"

It is clear that this Court in the two *Worthern* cases has indicated the limitation to which the doctrine of the *Blaisdell* decision may be carried. The law which the legislature of New York enacted fully meets the acid tests of the decisions of this Court.

The last paragraph of the quotation from the decision in the *Worthen* v. *Thomas* case (Appellant's Brief, p. 17) readily shows the distinction between that case and the case at bar.

The distinction between the *Louisville Bank* v. *Radford* case and the *Blaisdell* case was pointed out by Mr. Justice Brandeis at page 581 where he said:

> "Statutes for the relief of mortgagors, when ap-

plied to preexisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co.* v. *Kavanaugh, ante,* p. 56, when it appeared that this substantive right was substantially abridged. Compare *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426" (p. 581).

In the case at bar the New York statute preserves substantially the remedies of the mortgagee.

The appellant quotes a substantial part of the recent decision of the Supreme Court of Pennsylvania in the case of *Beaver County Building and Loan Association* v. *Winovich,* wherein the Supreme Court of that state held unconstitutional the Deficiency Judgment Statute of Pennsylvania.

In order to arrive at its decision the Pennsylvania Court disposed of the *Blaisdell* case upon the theory that the statute in the latter case suspended a remedy, whereas the Pennsylvania statute did not suspend the remedy but impaired a substantive right.

Whatever may have been the provision of the statute so as to justify the conclusion of the Pennsylvania Court, the reasoning does not apply to Chapter 794 because that statute is nothing more than a suspension of the remedy with provision made for alternative relief. In effect it suspends during the period of emergency the right of a mortgagee to pursue his usual remedies unless the mortgagee is satisfied to credit against the mortgage indebtedness the reasonable value of the mortgaged property. It no more interferes with the substantive rights than does the Minnesota statute which

suspends during the emergency the right of the mortgagee to obtain an absolute title if reasonable compensation be paid to the mortgagee during the interval.

Further the Pennsylvania State Constitution expressly provided that the legislature shall not pass any local or special law authorizing the impairment of liens; or providing or changing methods for the collection of debts or enforcing judgments or prescribing the effect of judicial sales of real estate.

The mortgagee in that case obtained a money judgment, on the bond and mortgage, which was perfected and docketed on December 27th, 1933, On the same day the judgment creditor issued a writ of execution to sell the mortgaged premises to satisfy the debt. The legislation held unconstitutional as impairing the judgment became effective January 17th, 1934, twenty days after the judgment was obtained and the writ of execution issued thereunder.

Most of what the prevailing opinion said was *obiter*. The decision must be confined to the fact that the act took effect after the judgment was obtained and the writ of execution issued and the act was clearly prohibited by the State Constitution. It was not necessary for the Court to pass on the impairment clause of the Federal Constitution.

The New York statute does not affect any final judgments obtained before the effective date of the emergency laws. It expressly preserves the rights acquired under any such judgments (Chapter 793, Section 1077-e of the Civil Practice Act).

It should also be noted that in the *Pennsylvania* case the Court concluded that prior to the enactment of the statute involved the extent to which a debtor was released from personal liability on the foreclosure of a mortgage was measured by the selling price of the mortgaged property obtained by the Sheriff irrespective of

any other value and that the mortgagee could become the purchaser at the sale without restriction. Neither of these statements represent the law of New York prior to its moratorium laws. In New York a court of equity has always enjoyed the power to set aside an inadequate and unconscionable bid (pp. 40-41, *supra*) and Rule 259 of its Rules of Civil Practice expressly reserves to the court the power to deny to the mortgagee the privilege of becoming the purchaser (p. 39 *supra*).

The peculiarity of the Pennsylvania statute and the reasoning of the Pennsylvania Court are probably explained by the fact that in Pennsylvania equitable jurisprudence has had a limited and distorted existence by reason of the early determination in that commonwealth to abolish courts of equity. (See 1 Law Quarterly Review, 455 and 1 Pomeroy Equity Jurisprudence, Sec. 338.) One of the judges concurring in the opinion of the Pennsylvania Court seems to have been influenced by the belief that even in that State equity enjoyed sufficient power, without a statute, to protect the mortgagor. Another member of the Court wrote a strong dissenting opinion.

The appellant at pages 22 and 23 of her brief cites various decisions which she claims are authorities for the argument that the vacation or serious modification of preexisting law as it affects an existing contract is repugnant to Section 10 of Article 1 of the Constitution. These decisions were concerned with legislation enacted in normal times when the rights of the parties and the public interests were not affected by unusual conditions.

That which is normally the subject of private treaty and which ordinarily constitutes a strictly private right may, in moments of emergency, become a vital public interest justifying interference by the state (*Wilson* v.

New, 243 U. S. 332). The emergency produces the necessity for legislation and the necessity justifies the exercise of the police power over property and contracts alike (*Union Dry Goods Co.* v. *Georgia Public Service Commission,* 248 U. S. 372).

The appellant also cites on page 23 of her brief seven cases where she contends that State Courts have held as unconstitutional "similar legislation".

Travellers Ins. Co. v. *Marshall,* 124 Tex. 45 (1934), did not pass upon the validity of the Texas moratorium laws under the Federal Constitution. The Court there considered only the contracts clause of the Texas Constitution of 1877 which, unlike the contracts clause of the Federal Constitution, was in terms made a limitation on the police power of the State.

In the case of *Federal Land Bank of Omaha* v. *Wilmarth,* 218 Iowa 339 (1934), the Court specifically said (at p. 352):

> "* * * No question is raised in this case concerning the constitutionality of the above-quoted statute now under consideration. * * *"

The constitutionality of such legislation had already been upheld in *Des Moines Joint Stock Land Bank* v. *Nordholm* (1934), 217 Iowa 1319, followed in *Craig* v. *Waggoner* (1934), 218 Iowa 876, and *Tusha* v. *Eberhart* (1934), 218 Iowa 1065.

The case of *Hanauer* v. *Republic Bldg. Co.,* 216 Wis. 49, is clearly distinguished from the *Blaisdell* case by the Court where it says (at p. 58):

> "* * * The statute in the *Blaisdell* Case was definitely limited as to time. While Sec. 269.58 is stated to have been enacted in response to the present emergency, it contains no provision definitely limiting its terms * * *."

The case of *Langever* v. *Miller,* 124 Tex. 80 (1934), was expressly distinguished from the *Blaisdell* case by the Court (at p. 86):

> "The Act in the instant case, while passed because of the prevailing industrial depression, is not a limited duration. Its effect is not confined to the period of emergency conditions, as were the Housing and Rents Cases * * * and the *Blaisdell* case, * * * but it is a permanent law intended to prevail until repealed or amended by the Legislature. That line of cases would not sustain the validity of the Act, * * *"

She also cites, at page 20 of her brief, the case of *Vanderbilt* v. *Brunton Piano Co.,* 111 N. J. L. 596, and states it "likewise holds the New Jersey statute unconstitutional". The reason therefor can readily be seen from that part of the decision (on pp. 602, 3) reading:

> "* * * the statute neither purports to be directed towards an emergency nor limits the application of the enactment either in field or in time. Its purview is absolute, final and permanent * * *."

The other three cases cited were decided before the *Blaisdell* case.

On the other hand we note since the *Blaisdell* decision an increasing disposition on the part of State Courts to uphold emergency legislation for the relief of mortgagors. This trend is evidenced by decisions in

Alabama—*Mutual Bldg. & L. Ass'n* v. *Moore* (1936), 169 So. (Ala. S. Ct.) 1;
Arkansas—*Sewer Imp. District No. 1 of Wynne* v. *Delinquent Lands* (1934), 188 Ark. 738;
Iowa—*Connecticut General Life Ins. Co.* v. *Roth* (1934), 218 Ia. 251;
Craig v. *Waggoner* (1934), 218 Ia. 876;
Tusha v. *Eberhart* (1934), 218 Ia. 1065;

Louisiana—*Metropolitan Life Ins. Co.* v. *Morris* (1935), 181 La. 277;
Michigan—*Daugherty* v. *Reading* (1934), 266 Mich. 514.

POINT V.

The instrument sued upon is very obviously a collateral bond and not a primary obligation as claimed by appellant.

It is not apparent as to how this question can properly come before this Court on this appeal. However, since the appellant has elected to raise the point (Point I of Appellant's Brief) the appellee answers it here.

At the time that the original bond and mortgage described in paragraphs I and II (R. 9) of the amended complaint were assigned to the appellant's assignor, there was executed and delivered by John H. Hanan, Addison G. Hanan and Herbert W. Hanan to the appellant's said assignor the collateral bond in question and also the extension agreement referred to in paragraph V of the said amended complaint (R. 10). All the instruments were delivered simultaneously and it was a single transaction.

The appellant contends "The loan made by the appellant's guardians to defendant's testator is evidenced by a written instrument attached to the complaint, Exhibit A (Record, p. 12)." (Appellant's Brief, p. 6.)

The instrument itself shows, to the contrary, that the loan was not made to the "defendant's testator". There is no recital in said bond of an existing indebtedness on the part of the obligors. The preamble recites that John H. Hanan, Herbert W. Hanan and Addison G. Hanan "*are held and firmly bound* unto Martin H. Taylor and Leander H. LaChance as General Guardians" of the persons and estates of Marian Stewart and Jean

Stewart, infants, in the sum of Sixty thousand ($60,000) Dollars.

The absence of a recital in the preamble that the obligors are *indebted* to the obligees, in itself makes the instrument different from the usual bond. It states that the obligors are *bound*. Why did they bind themselves in the sum of Sixty thousand ($60,000) Dollars? The recitals following the preamble clearly give the reason, viz.:

The first *Whereas* (R. 13) recites the 1907 bond for One hundred eighteen thousand ($118,000) Dollars made by John H. Hanan and John H. Hanan Realty Company to Louise L. Williams and others, as trustees, and the mortgage given as security therefor. The second *Whereas* (R. 13) recites the assignment of said bond and mortgage to John H. Hanan and that John H. Hanan "is *about to assign* the said bond and mortgage to the obligee above named". The third *Whereas* (R. 13 and 14) recites that "*John H. Hanan Realty Company* has executed and delivered to the obligee above named an extension agreement bearing even date herewith wherein and whereby" the said John H. Hanan Realty Company agrees to pay to said obligee the principal sum of Sixty thousand ($60,000) Dollars "being the balance unpaid upon the said bond and mortgage" on August 17th, 1923, with interest.

The last *Whereas* (R. 14) recites that "to induce the said obligee to advance the said sum of Sixty thousand ($60,000) Dollars, *upon the said bond and mortgage*, as aforesaid, and to execute and deliver the said extension agreement, the said obligors hath agreed to make, execute and deliver this bond as *further and additional security* for the payment of the said above-mentioned bond and mortgage".

The said recitals clearly show that the transaction was a mortgage loan made by taking an assignment of

an existing mortgage and extending it at the new amount for three years instead of satisfying the old mortgage and making a new mortgage. This is a practice provided for by statute (Real Property Law of New York, Section 275) and familiar to all persons dealing in mortgages. It is done to minimize recording taxes. In this case Three hundred ($300) Dollars in mortgage taxes was saved by assigning the mortgage instead of executing a new one.

Aside from these recitals, the condition of the instrument, expressly set forth in its concluding paragraph, shows the nature of the obligation, to wit:

> "NOW THEREFORE THE CONDITION OF THIS OBLIGATION IS SUCH, that if the parties bound to pay the moneys secured by said bond and mortgage, or the above-bounden obligors, their respective legal representatives or assigns shall well and truly pay, or cause to be paid, to the said obligee, their successors, legal representatives or assigns, the just and full sum of sixty thousand dollars ($60,000), together with all interest thereon, as the same shall become due and payable according to the terms and conditions of the aforesaid bond and mortgage and extension agreement; and if the said obligors, their respective legal representatives and assigns shall, at all times hereafter, hold, indemnify and save harmless the said obligee, their successors, legal representatives and assigns, from and against all loss, damages, costs, expenses, suits, actions, claims and demands whatsoever, which they may or might otherwise, at any time hereafter, sustain, suffer, be liable to or obliged to pay *under or by reason of any default in any of the terms, provisions, covenants or conditions of the aforesaid bond and mortgage or any extension thereof,* then this obligation to be void, otherwise to remain in full force and virtue."

It will be observed that the liability of the obligors depended upon the failure of the "parties bound to pay" (the owner of the mortgaged premises) to comply with the conditions of the original bond, mortgage and extension agreement.

There is no recital in the bond to the effect that the obligees loaned or were about to lend to the obligors the sum of Sixty thousand ($60,000) Dollars. If the transaction was a loan to the obligors it is reasonable to assume a recital to that effect would have been incorporated in the bond. Appellant attempts to spell out a loan to the obligors because the recital in the last *Whereas* clause states in part that it was made in order to induce the obligee to advance Sixty thousand ($60,000) Dollars upon the bond and mortgage and extension agreement. It does not say that the advance was to be made *to the obligors,* and the instrument must be read in its entirety to ascertain the meaning and intent of the parties. When so read no such inference can fairly be drawn from it.

The language of this bond, "Exhibit A", was not that of layman. It is plainly the work of counsel, who, it must be assumed, completely reduced his client's transaction to writing. It cannot be presumed that he overlooked inserting an express provision that the obligors borrowed Sixty thousand ($60,000) Dollars from the obligees and were to repay it; and that John H. Hanan, one of the obligees was giving a bond and mortgage of Sixty thousand ($60,000) Dollars as collateral for the payment of such a loan. If it was a loan to the obligors, why did she use the printed form of a Collateral Bond instead of an ordinary Bond form?

The record does not disclose what is disclosed by the photostatic copy of this bond attached to the amended complaint, and that is that this bond is on the usual printed legal form of collateral bond supplied by sta-

tioners and at the extreme upper left hand corner thereof there is printed the Index title "Collateral bond".

If the original bond and mortgage were given as collateral security this bond would not have recited that John H. Hanan was "about to assign" the bond and mortgage to the obligee. The transaction was too important to believe that some simple provision would not have been inserted in the bond clearly and explicitly showing that the bond and mortgage were given as collateral security only. The obvious reason such provision was not inserted is that such was not the transaction. The failure of the bond to contain such a provision, its verbiage and the fact that the transaction was with General Guardians who could not legally invest their ward's funds in a personal loan, conclusively show that this "Exhibit A" now sued upon was taken as a collateral bond guaranteeing payment of the 1907 bond and mortgage being then assigned to appellant's guardians.

Counsel for appellant in attempting to show that "Exhibit A" is a primary obligation argues the general rule that the character of a promise is not to be determined with reference to the language employed and cites *Clark* v. *Howard,* 150 N. Y. 232 (239); *Matter of People,* 264 N. Y. 88, and 28 Corpus Juris, page 886, Section 1. These citations simply indicate that a document may be so worded that it may sound like a guaranty or indemnity agreement, but in fact may be something different. But such is not the case here.

He argues that the transaction was "not a sale of the 1907 bond and mortgage with a guaranty" (Appellant's Brief, p. 7). The fact is *it was just that.* This same point was raised by this appellant before the

New York Court of Appeals. At that time the appellee pointed out to that Court that the bond in question contained substantially the same language as the bond involved in the case of *City Bank Farmers Trust Co.* v. *Ardlea,* 267 N. Y. 225, in which that Court had held the similar bond to be a guaranty and, therefore, within the Mortgage Moratorium laws.

It would appear that the appellant has turned face about on this point since her foreclosure action because in the extension agreement of November 20, 1926, a copy of which was attached to the moving papers on the appellant's motion for summary judgment in said previous action there is this recital:

> "Witnesseth, that the party of the first part, the holder of a certain bond made by John H. Hanan and John H. Hanan Realty Corporation, dated January 10, 1907, and also of a *certain collateral bond* made by John H. Hanan, Herbert W. Hanan and Addison G. Hanan, *dated August 9, 1920,* both of said bonds being secured by a mortgage bearing date January 10, 1907, * * *." (Italics ours.)

And in the memorandum submitted to the Court by the appellant on her said motion there is a statement by her attorney:

> "The said Herbert W. Hanan originally signed a *collateral bond* in connection with plaintiff's mortgage. In 1926, however when the same was extended for a further period of 5 years, said Herbert W. Hanan joined with the John H. Hanan Realty Company in the execution of the extension agreement. It was his intention *to become liable personally* for the repayment of the mortgage indebtedness and it was on the strength of his signing said agreement that the plaintiff extended the loan." (Italics ours.)

In spite of those previous admissions the appellant

now tries to maintain that the original mortgage loan was made to Herbert W. Hanan. Thus does she change her argument to suit her predicament.

This question as to whether the instrument was on one hand a primary obligation or on the other hand a collateral bond or guaranty was gone into at great length in the lower courts and it would appear from the unanimous affirmances of the judgment in favor of the appellee that the question has already been finally and definitely adjudicated against the appellant.

The appellee there stressed that the instrument in question fell within the category specified in Section 1077-b of the Civil Practice Act; that it was a "collateral bond"; that it was a "guaranty" of an "obligation secured by such mortgage"; that it was made "simultaneously" with the foreclosed mortgage, as that word had been construed by the Court of Appeals in *Klinke* v. *Samuels*, 264 N. Y. 144, *City Bank* v. *Ardlea*, 267 N. Y. 224, and *Kramer* v. *Relgov*, 268 N. Y. 592.

Since all the lower courts unanimously found that the "Mortgage Moratorium laws apply" it must follow that they conclusively found the instrument in question to be one described in said Section 1077-b of the Civil Practice Act, the constitutionality of which is not questioned here.

POINT VI.

The appeal herein should be dismissed or, in the alternative, the judgment of the Supreme Court of the State of New York should be sustained.

Respectfully submitted,

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APPENDIX.

Chapter 793.

AN ACT to amend the civil practice act, in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It is hereby declared that a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

SECTION 2. The civil practice act is hereby amended by inserting therein new sections, to be sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f and ten hundred seventy-seven-g, to read as follows:

SECTION 1077-a. FORECLOSURE FOR PRINCIPAL DEFAULTS SUSPENDED.—During the period of the emergency

as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

SECTION 1077-b. ACTIONS ON BONDS FOR PRINCIPAL DEFAULTS SUSPENDED.—No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of section ten hundred seventy-seven-a or upon a guaranty of any obligation secured by such mortgage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment

be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of non-payment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

SECTION 1077-c. NOTICE OF APPLICATION.—Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon eight days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to

foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements. This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

SECTION 1077-d. WAIVER AGAINST PUBLIC POLICY.—Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by sections ten hundred seventy-seven-a and ten hundred and seventy-seven-b, shall be deemed to be void as against the public policy and be wholly unenforceable.

SECTION 1077-e. APPLICATION TO PENDING ACTIONS.—Sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-d shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this act takes effect, but otherwise such action or proceeding may continue.

SECTION 1077-f. STATUTE OF LIMITATIONS NOT TO RUN DURING EMERGENCY.—Any action or proceeding within

the scope of this act, which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of article two of the civil practice act during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

SECTION 1077-g. MORTGAGES NOT AFFECTED.—The provision of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-d, ten hundred seventy-seven-e and ten hundred seventy-seven-f shall not apply to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan, or made in accordance with the provisions of sections three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred thirty-four.

SECTION 3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

SECTION 4. This act shall take effect immediately.

FILED
JAN 13 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 370

MARIAN S. HONEYMAN

Appellant

v.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased

Appellee

BRIEF ON BEHALF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1936

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MARIAN S. HONEYMAN,

Appellant,

v.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF ON BEHALF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Statement

This brief is filed on behalf of the State of New York as *amicus curiae* pursuant to the stipulation of the parties and the special leave of the Court.

The legislation (Chapter 794, Laws of 1933), the constitutionality of which is now before this Court, is of grave consequence to the People of the State of New York. This statute, passed simultaneously with Chapter 793 of the Laws of 1933 (mortgage moratorium statute), constituted, with that statute, perhaps the most important part of a comprehensive program for the relief of mortgage creditors and debtors enacted at an Extraordinary session of

the Legislature of the State of New York in August of 1933. Because of the amount of money invested in mortgages on New York real estate (approximately $10,500,000,000 in 1932[1]), as well as the equities in this real estate, and the number of people affected, the people of the State of New York are vitally interested in sustaining the constitutionality of this statute.

The facts on this appeal are fully stated in the briefs of appellant and appellee. They require no restatement here. Nor will this brief be directed to the important question of jurisdiction herein, or to the question of whether the obligation upon which suit has been brought is primary or collateral. The brief of amicus will be directed solely to the constitutionality of Chapter 794 of the Laws of 1933.

POINT I

Chapter 794 of the Laws of 1933 does not impair the obligations of the mortgage contract.

At the time of the execution of the instrument upon which action is brought herein, Section 1083 of the Civil Practice Act governed proceedings to secure deficiency judgments in foreclosure. That section provided:

> "If a person who is liable to the plaintiff for the payment of a debt secured by the mortgage is made a defendant in the action and has appeared or has been personally served with the summons, the final judgment *may* award payment by him of the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained therein." (Italics ours.)

(1) See page 10, *infra*.

Sections 1083-a and 1083-b (Chapter 794 of the Laws of 1933) were passed subsequent to the making of appellant's contract.

The inherent power of equity in foreclosure proceedings has long been recognized to prevent gross inadequacy of price and excessive hardship and injury.

> *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, 446;
> *Graffam* v. *Burgess,* 117 U. S. 180, 191, 192;
> *Suring State Bank* v. *Giese,* 210 Wis. 489.

The Court is not a mere mechanical enforcing agency of the bare terms of mortgage agreements. It must protect and enforce all the equities involved.

> *Louisville Trust Company* v. *Louisville, etc. Railway,* 174 U. S. 674, 688, 689.

The decisions under Section 1083 C. P. A., just as the cases above cited, clearly establish that the appellant had no absolute or vested right to a judgment for the full difference between the proceeds of the foreclosure sale and the mortgage debt.

> *Monaghan* v. *May,* 242 App. Div. 64;
> *Guaranteed Title and Mortgage Company* v. *Scheffres,* 247 App. Div. 294;
> *Kurtz et ux.* v. *Ferrante et al.,* 243 App. Div. 739.

In *Monaghan* v. *May, supra,* the mortgages foreclosed aggregated $24,077.55. Plaintiff, the mortgagee, bid in the property for the sum of $5;000 and moved to confirm the referee's report of sale and for a deficiency judgment of $19,791.71. Leave to enter a deficiency judgment was denied on the ground that the value of the mortgaged

property in the hands of the mortgagee equaled the mortgage debt and completely satisfied it. The Court held that Section 1083 of the Civil Practice Act, providing that the Court *may* grant a deficiency judgment, is not mandatory, but leaves it within the discretion of a court of equity to grant or withhold such relief. The sale of the property was held shortly before the passage of Chapter 794 of the Laws of 1933. The decision of the Appellate Division was made subsequent to the passage. In answer to the argument that Chapter 794 did not apply to that action the Court said in part:

> "The Legislature has declared that an emergency exists, fixed the period thereof, and declared that certain remedies available to mortgages (*inter alia,* in respect to deficiency judgments) shall be subject to limitations during that period. These enactments 'provide procedure and relief which are cognate to the historic exercise of equitable jurisdiction.' Equity is not circumscribed by these statutory dates if the emergency in fact had an earlier origin. These enactments do not deprive a court of equity of its inherent power to place limitations upon the remedies available to a mortgagee in consonance with fundamental doctrines of equity. (*Clinton Trust Co.* v. *142-144 Joralemon Street Corp.,* 237 App. Div. 789.) A court of equity may do this during such times as it deems are within the period of economic stress and emergency, which period may be equal to or greater than that fixed by the Legislature.
>
> When the Legislature spoke, mortgagors and mortgagees learned, earlier than they would have if left to the results of invoking judicial power, that continued abnormal economic conditions would not be permitted to unjustly oppress the borrower. *But the judicial power to effect the same result has*

always been and still is there, responsive to a proper case for its exercise—apart from the statutory declarations (pp. 65 and 66).

* * * * * * *

In exercising its statutory jurisdiction, a court of equity will be guided by equitable principles. To obtain a deficiency judgment and determine the amount thereof, it is necessary to invoke equitable power to confirm the sale had under the judgment of foreclosure. When seeking affirmative judicial action in equity, one may not succeed if one is asking an inequitable or unconscionable result. Equity may refuse to confirm such a sale where it has produced an inadequate price (pp. 66 and 67).

* * * * * * *

The court found that the mortgagee was the purchaser at a price that was so inadequate as to shock the conscience of the court. It concluded to treat the price as merely nominal and to confirm the report in view of its further finding that the true value of the property in plaintiff's hands was equal to the amount of the mortgage debt. This made it equitable to confirm the report of sale, since the property vested in the mortgagee and fully satisfied the mortgage debt. This procedure constituted the mortgage debt as the real price on the sale. *The court having the power to refuse to confirm the report of sale because the price was inadequate, it likewise had the kindred power to refuse to authorize the entry of a deficiency judgment based on such a sale and computed on such an inadequate or nominal price base. The court thus merely declined to exercise its statutory jurisdiction except where its powers in this regard are invoked to do equity.* If the property did not equal in value the mortgage debt, then equity would require the granting of a deficiency judgment; but that is not this case (p. 67).

* * * * * * *

No rights vest, perforce the judgment of foreclosure, in plaintiff for a deficiency judgment in any amount until plaintiff satisfies a court of equity that it would be equitable and just, as a consequence of what has occurred on the sale, to authorize the entry of a deficiency judgment'' (p. 67). (Italics ours.)

Appellant's right to a deficiency judgment was thus subject, before the enactment of Chapter 794, to the provisions of Section 1083 of the Civil Practice Act and to the inherent power of equity to refuse to grant him anything beyond the satisfaction of his debt. Chapter 794 recognized that conditions of hardship were no longer occasional but, indeed, universal. In so doing it merely directed that in *all cases of foreclosure during the limited period of the emergency, necessitous circumstances compelled that deficiency judgments be subjected to judicial scrutiny and that equitable principles be applied to all persons applying for them.*

It is apparent that not even the remedies of the appellant were affected. The remedy was always subject to the inherent power of equity and Chapter 794 merely enlarged the group of cases in which equitable defenses and principles would be applied.

Appellant will undoubtedly contend that his constitutional right is not subject to such an enlargement. He contends that his contract embraced by implication only the remedies and procedure provided in said Section 1083 of the Civil Practice Act.

The people of the State of New York contend that since no person had an absolute right to a deficiency judgment prior to the passage of Chapter 794, no contractural right is lost or impaired by a statute which only defines or limits a right which is conditional, not absolute.

No one has a vested right to particular remedies or procedures, even though they are in existence when contracts are made.

Oshkosh Water Works Company v. *Oshkosh,* 187 U. S. 437, 439.

The remedies available to enforce a contract may be enlarged, modified or restricted without doing violence to Article 1, Section 10 of the Constitution.

Waggoner v. *Flack,* 188 U. S. 595, 602, 603 (Statute changed contract so as to give state previously non-existent right of forfeiture of contract);

Bernheimer v. *Converse,* 206 U. S. 516, 530 (Statute gave receivers rights to sue non-resident stockholders);

Red River Valley Bank v. *Craig,* 181 U. S. 548 (Change in law as to rights of lienors to compel sale of land as against mortgagee);

Wilson v. *Standefer,* 184 U. S. 399 (Permitted forfeiture of land contracts by the state without judicial proceedings);

Crane v. *Hahlo,* 258 U. S. 142, 147 (Changed method of review in condemnation cases from general review to a very limited form of review);

Home Building and Loan Association v. *Blaisdell,* 290 U. S. 398, 429, 430 (Permitted the extension of the period of redemption in mortgage foreclosures).

The principle underlying Chapter 794 is analogous to that stated in the case of *Bernheimer* v. *Converse, supra.* In that case this Court said:

> "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made" (p. 530).

Chapter 794 makes more universally enforcible pre-existing equitable remedies, just as the statute made more universally enforcible the remedies in the *Bernheimer* case cited above.

It cannot be said that such alteration of procedure deprives appellant of his right to a deficiency judgment. In the first place, there is no *absolute* right. In the second place, he may even now have a deficiency judgment if the value of the property is insufficient to make him whole.

See *Heiman* v. *Bishop*, 272 N. Y. 83.

That Chapter 794 was in response to public need and legitimately addressed to those needs is more fully discussed in a succeeding portion of this brief.

POINT II

Chapter 794 of the Laws of 1933 is a valid exercise of legislative power.

The pertinent constitutional questions as to the validity of Chapter 794 of the Laws of 1933 under Article 1, Section 10 of the Constitution, were discussed fully by this Court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398. In that case this Court declared certain established principles of constitutional law:

First: The police power of a state may be exercised directly to prevent the immediate and literal enforcement of contractual obligations by temporary and conditional restraint where vital public interests would otherwise suffer (pp. 440, 436, 437).

Second: Though emergencies do not create legislative power, they furnish the occasion for the exercise of that power (p. 426).

Third: The question in such cases is whether the emergency and the legislation bear to each other some just, legitimate and reasonable relation (p. 426).

Fourth: The economic interests of the state may, through the police power, justify the interference of its dominant power notwithstanding interference with contracts (p. 437).

Fifth: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order" (p. 435).

SIXTH: The facts found by the Legislature are presumed to be true in the absence of patent invalidity or proof to the contrary. Further, economic facts of common knowledge may be considered by the Court in determining if there exists the emergency which occasioned the exercise of the power (p. 444). (Commonly known facts of the mortgage emergency in New York appear in Appendix.)

A. The emergency which compelled the legislative action in Chapter 794 of the Laws of 1933.

The depression "is the outstanding contemporary fact, dominating thought and action throughout the country."

Atchison T. & S. F. R. Co. v. *U. S.*, 284 U. S. 248, 260.

The largest item in the internal national debt account in 1932 was the mortgage burden on the country's real estate.

Clark, the Internal Debts of the United States (20th Century Fund, 1933), page 6, *et seq.*

The urban mortgage debt burden increased by more than 300% from 1922 to 1929.

Clark, op. sit., supra, page 16.

And of the total national mortgage debt of approximately $35,000,000,000 in 1932, it has been estimated that almost 30% was secured by New York real estate.

Clark, op. sit., supra, page 5;
New York Herald Tribune, December 30, 1934, page 2.

In 1932, when the epidemic of forced sales through foreclosure reached its peak, properties foreclosed were more than six times the number of those foreclosed in 1928.[1] The assessed valuations of foreclosed properties in the Borough of Manhattan, in the City of New York in 1932 were $252,550,500 as compared with assessed values of foreclosed properties of $39,332,000 in 1928.[2] Of the properties foreclosed 91.6% were income producing.[3] Table II shows the various types of buildings which were subjected to foreclosure in the period from 1928 to 1932.

The Courts of New York took judicial notice of the sudden change in economic conditions which resulted in widespread damage to real estate investors.

> *Matter of People* (*Title and Mortgage Guaranty Co.*), 264 N. Y. 69, 85;
> *Klinke* v. *Samuels*, 264 N. Y. 144.

The situation before the Legislature disclosed that in the period of stress immediately preceding the passage of Chapter 794, property owners were not only faced with the loss of their properties but with the imposition of a terrific burden in the form of deficiency judgments. Not only were these deficiency judgments large in amount, but the deficiencies had no actual relation to the difference in value between the properties acquired in foreclosure and the amount due the mortgagee. The effect was not only to satisfy the mortgagee's debt, but to pillage the debtor's estate (*Young* v. *Weber*, 117 N. J. Eq. 242).

In Appendix Table III, the relationship between the sum bid in the foreclosure sale, the mortgage debt, the re-

(1) See Appendix Table I.
(2) See Appendix Table I.
(3) See Appendix Table II.

saltant deficiency judgment and the assessed valuation of the properties foreclosed is shown. The amount bid at the foreclosure sale is 10.44% of the value of the property as assessed for tax purposes in the 8 months period immediately preceding the passage of Chapter 794, L. 1933. Furthermore, it appeared that practically no one other than the mortgagee was bidding in at these foreclosure sales (see Appendix Table V). There was a total absence of any competition. As a result, any bid, however nominal, secured the sale at the auction room.

Under such circumstances, the situation became one in which mortgagees had within their grasp the possibility of double satisfaction. They were securing property worth in most cases the amount of the mortgage debt and, in addition, a deficiency judgment for practically the full amount of the debt (see Appendix Table III).

With these facts before it, the Legislature enacted Chapter 794 of the Laws of 1933.

The declaration of emergency included in Section 1 of Chapter 794 recites the existence of conditions which in view of the circumstances indicated herein justified the enactment. Their findings may not be lightly set aside.

Home B. & L. Ass'n v. *Blaisdell, supra,* at p. 444.

B. The reasonableness of the statute.

Chapter 794 of the Laws of 1933 does not prohibit deficiency judgments. It requires that established equitable principles be applied in each instance where an application for a deficiency judgment is made. The actual value of the property is set off against the debt. A deficiency judgment is denied only where that value is equal to or greater than the debt. If that value is less than the debt, the judgment must be for the difference between the two.

It is manifestly not unreasonable to require this offset in view of the fact that over 90% of the property involved in foreclosures between 1928 and 1932 was income producing (see Appendix Table II).

In Appendix Table V, the operation of Chapter 794 is shown. Of 172 applications for deficiency judgments made by the Mortgage Commission of the State of New York, 63 resulted in a denial of the application and in the remaining 109 cases deficiency judgments, varying between less than 1% and 75.8% of the mortgage debt were obtained. It appears that the statute merely results in more equitable deficiency judgments.

When the mortgagee makes his application for a deficiency judgment, the Court determines upon affidavit or other proof the fair and reasonable market value of the mortgaged premises as of the date of sale. In making this appraisal the Court must receive evidence

> "of the age and construction of the buildings on the premises, the rent received therefor, assessed value, location, condition of repair, the sale price of property of a similar nature in the neighborhood, conditions in the neighborhood which affect the value of the property therein, accessibility, and all other elements which may be fairly considered as affecting the market value of real property in a given neighborhood."
>
> *Heiman* v. *Bishop*, 272 N. Y. 83, 88.

This statute was held to be constitutional by the New York State Court of Appeals in the cases of *Klinke* v. *Samuels*, 264 N. Y. 144, *City Bank Farmers Trust Company* v. *Ardlea Corp.*, 267 N. Y. 224, as well as in this case.

The right which appellant claims to be deprived of is the right, in a foreclosure sale, to receive property whose

value is equal to or in excess of the mortgage debt and in addition, a deficiency judgment in an amount nearly equal to the mortgage debt.

The determining test in any case involving police power is whether or not the public benefit outweighs the resulting burden on individual interests. The burden upon the mortgagee under Chapter 794 is a requirement that he receive no more than that which is due him from the mortgagor. Such a "right" to double enrichment as the appellant here urges is unconscionable. The Constitution guarantees to no one the right to exploit or to take an unconscionable advantage of another.

Chicago Railroad etc. v. *Wellman,* 143 U. S. 339, 346;

Highland v. *Russell Car etc. Company,* 279 U. S. 253;

Patapsco Guano Co. v. *Board of Agriculture,* 171 U. S. 345;

Campbell v. *Holt,* 115 U. S. 620.

C. The provisions of the statute are limited "to the exigency which called it forth".

In accordance with the principles laid down in *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, and reiterated thereafter in *Worthen Company* v. *Thomas,* 292 U. S. 426, *Worthen Company* v. *Kavanaugh,* 295 U. S. 56, and *Louisville Bank* v. *Radford,* 295 U. S. 920, the relief sought to be afforded by this statute is limited strictly to the duration of the emergency and is based on reasonable terms (See Appendix Table V and *Heiman* v. *Bishop, supra*).

Not only does the statute provide for the relief to be limited strictly to the duration of the emergency period

of one year, but in addition provides an alternative remedy, the use of which relieves a mortgagee from any hardship which he may feel is imposed upon him by the statute.

In a case such as the instant one, where an independent action is being brought upon the collateral bond, there is no necessity for bringing the action during the period of the emergency. The Statute of Limitations does not run against the appellant during the emergency (Section 1077-f, Civil Practice Act, and see *City Bank Farmers Trust Company* v. *Ardlea,* 267 N. Y. 224, holding that Chapter 794 and Chapter 793, of which Section 1077-f is a part, must be read together). To this extent, the Statute merely sets up a limited postponement of the "right" to a deficiency judgment similar to the suspension expressly approved in the *Blaisdell* case.

Appellant argues that he is being deprived of a deficiency judgment permanently. He claims that once a deficiency judgment is denied to him, it is lost forever. In the first place, he may, by electing not to sue until the end of the emergency, avoid the provisions of the Statute. In the second place, he had no absolute right to a deficiency judgment under established equitable principles (see Point I, *supra*). In the third place, this Court has established that under certain necessitous circumstances, such impairment of contract as appellant claims to exist is proper under the Constitution.

Block v. *Hirsch,* 256 U. S. 135;
Marcus Brown Company v. *Feldman,* 256 U. S. 170;
Levy Leasing Company v. *Siegel,* 258 U. S. 242;
Home B. & L. Assn. v. *Blaisdell, supra.*

In the rent cases cited above, landlords were denied the right to oust tenants at the expiration of their leases, except upon reasonable terms. The right of ouster which existed at the termination of the tenant's lease *as of a particular date was permanently denied.* The power of ouster under a lease was revived at the termination of the emergency. At the end of the emergency here, Chapter 794 will become inoperative.

POINT III

The judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Commonly Known Facts of the Mortgage Emergency in New York

TABLE I

Increase in Foreclosures in Borough of Manhattan, New York City, from 1928-1932[1]

Year	Assessed Valuation of Property Foreclosed in Manhattan	Per Cent. of 1928
1928	$ 39,332,000	100.00
1929	67,290,000	171.1
1930	89,879,500	228.5
1931	172,332,000	438.1
1932	252,550,500	642.1

[1] Figures compiled by the State Board of Housing (R. & G., July 22, 1933, p. 5).

TABLE II

Types of Property in Foreclosure[1]

Type of Property	Percentage of the Assessed Value of Each Type of Property to the Assessed Value of the Total Foreclosed in Manhattan				
	1928	1929	1930	1931	1932
Apartments and Tenements	68.7	62.9	61.8	52.8	61.1
Dwellings	4.8	3.2	3.6	2.4	4.2
Hotels	1.3	4.9	3.9	1.7	4.9
Lofts	12.0	15.8	13.0	14.6	12.5
Office Buildings	3.2	1.9	6.5	21.4	8.5
Stores	.3	.4	3.2	.5	.8
Theatres and Halls	1.5	4.4	1.2	.6	3.1
Garages and Stables	2.4	.5	1.1	2.4	.7
Vacant Land	.4	.8	.2	.4	.5
Miscellaneous	5.4	5.2	5.5	3.2	3.7
Total	100.	100.	100.	100.	100.

[1] Figures compiled by the State Board of Housing (R. & G., September 8, 1934, page 8.

TABLE III [1]

One Hundred and Forty (140) Foreclosure Actions Brought in the Name of New York Title and Mortgage Company, Plaintiff, for the Period from January 1, 1933 to August 15, 1933, Inclusive

RECAPITULATION

1933		Bids in Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation For Tax Purposes
January	1st to 31st, incl.	$120,150	$1,238,395	$1,118,245	$1,516,050
February	1st to 28th, incl.	105,000	1,002,720	897,720	1,349,625
March	Through May 31st.	36,500	921,589	885,089	1,067,400
June	Through Aug. 15th..	235,900	671,420	435,520	829,500
		$497,550	$3,834,124	$3,336,574	$4,762,575

Total Due a/c Mortgage Indebtedness..	$3,834,124
Total Bids at Foreclosure Sales.....	497,550
Total Deficiency Judgments	$3,336,574

Purchase Price of $497,550 is 12.96% (per cent.) of total Mortgage Indebtedness

Purchase price of $497,550 is 10.44% (per cent.) of Assessed Valuation

		Bids at Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation For Tax Purposes
Jan.	1933	$ 1,000	$ 4,797	$ 3,797	$ 4,200
		1,000	4,749	3,749	2,850
		1,000	4,749	3,750	2,850
		2,000	22,967	20,967	32,000
		10,000	145,080	135,080	161,000
		1,000	4,784	3,784	5,000
		1,500	7,765	6,265	10,000
		1,500	7,074	5,574	6,600
		1,500	9,822	8,322	14,000
		1,000	4,182	3,182	4,200
		1,850	10,701	8,851	11,000
		17,550	18,594	1,044	20,000
		1,000	4,470	3,470	4,400

[1] Plaintiff in each of these foreclosure actions was the New York Title & Mortgage Company. The properties bought in by the N. Y. T. & M. Co. were in the names of Land Estates, Inc. and Liberdar Holding Corp., two wholly owned subsidiaries. Records on file at office of N. Y. T. & M. Co., No. 141 Broadway, New York City, N. Y.

		Bids at Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation For Tax Purposes
Jan.	1933	$ 800	$ 7,421	$ 6,621	$ 7,200
		950	7,644	6,694	7,000
		1,200	10,759	9,559	13,000
		1,500	9,470	7,970	11,000
		1,000	4,018	3,018	4,200
		2,500	43,130	40,630	55,000
		1,500	9,476	7,976	11,000
		1,500	9,462	7,962	11,000
		1,000	6,188	5,188	9,500
		1,950	16,684	14,734	12,000
		600	4,816	4,216	4,500
		1,000	19,240	18,240	19,700
		1,000	37,689	36,689	50,000
		5,000	85,135	80,135	112,000
		10,000	36,187	26,187	46,000
		1,000	18,020	17,020	25,500
		1,000	25,312	24,312	38,000
		10,000	147,395	137,395	210,000
		1,000	18,362	17,362	45,200
		5,000	64,402	59,402	75,000
		11,000	11,980	980	15,000
		1,000	4,432	3,432	4,600
		1,000	4,397	3,397	4,200
		1,200	8,671	7,471	10,300
		1,200	8,658	7,458	10,200
		1,150	8,661	7,511	10,000
		1,000	4,234	3,234	4,800
		11,000	16,387	5,387	21,000
		100	7,322	7,222	10,000
		100	8,378	8,278	10,000
		100	8,701	8,601	11,000
		100	8,489	8,389	12,000
		100	11,530	11,430	15,000
		100	6,607	6,507	6,900
		100	8,399	8,299	9,500
		100	8,416	8,316	8,500
		100	8,077	7,977	8,000
		100	11,900	11,800	18,000
		100	195,596	195,496	210,000
		100	61,765	61,665	75,000
Feb.	1933	10,000	108,814	98,814	125,000
		5,000	104,065	99,065	105,000
		400	4,897	4,497	4,600

		Bids at Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation For Tax Purposes
Feb.	1933	$ 1,100	$ 8,556	$ 7,456	$ 8,000
		650	5,579	4,929	2,775
		650	5,569	4,919	2,775
		650	5,564	4,914	2,750
		650	5,665	5,015	2,800
		10,000	66,843	56,843	33,000
		650	5,616	4,966	2,800
		1,000	37,714	36,714	57,000
		100	8,000	7,900	9,800
		100	13,223	13,123	14,000
		2,000	34,494	32,494	43,000
		5,000	119,016	114,016	150,000
		650	5,880	5,230	2,775
		100	9,039	8,939	11,000
		500	1,208	708	3,000
		800	4,517	3,717	4,600
		7,000	14,723	7,723	16,000
		2,000	4,561	2,561	4,600
		10,000	27,195	17,195	30,000
		1,250	7,514	6,264	6,000
		1,000	5,112	4,112	6,100
		750	6,452	5,702	5,500
		2,500	111,085	108,585	120,000
		100	14,828	14,728	17,000
		1,000	56,731	55,731	310,000
		100	4,630	4,530	4,000
		1,000	5,117	4,117	5,500
		1,000	7,291	6,291	7,350
		1,000	7,400	6,400	6,300
		3,000	7,612	4,612	7,000
		7,500	8,647	1,147	11,000
		5,000	12,726	7,726	10,500
		10,000	79,965	69,965	110,000
		1,500	10,823	9,323	12,500
		1,000	6,614	5,614	8,000
		1,000	21,337	20,337	35,000
		1,000	4,704	3,704	4,700
		3,000	9,478	6,478	10,200
		800	4,166	3,366	3,700
		1,500	4,444	2,944	6,000
		1,000	5,306	4,306	3,000
March	1933	100	5,296	5,196	8,500
		100	10,533	10,433	12,500

	Bids at Foreclosure Sales	Mortgage Debt	Deficiency Judgment	Assessed Valuation For Tax Purposes
March 1933	$ 1,200	$ 8,232	$ 7,032	$ 7,600
	1,000	12,013	11,013	18,500
	1,500	23,150	21,650	24,000
	5,000	34,615	29,615	43,000
	5,000	39,727	34,727	35,000
	1,000	12,542	11,542	14,000
	1,000	26,744	25,744	20,000
April 1933	1,000	24,746	23,746	38,000
May 1933	100	395,795	395,695	390,000
	100	10,944	10,844	13,000
	100	10,466	10,366	13,000
	100	10,436	10,336	13,000
	5,000	119,016	114,016	185,000
	100	10,979	10,879	12,500
	100	9,342	9,242	8,200
	3,000	30,927	27,927	33,000
	100	6,144	6,044	6,500
	2,000	18,072	16,072	11,300
	100	9,342	9,242	8,000
	100	9,189	9,089	10,000
	100	9,340	9,240	8,100
	3,000	12,081	9,081	17,000
	100	10,332	10,232	12,500
	100	10,279	10,179	12,500
	4,000	20,346	16,346	41,000
	1,200	8,590	7,390	7,000
	100	9,398	9,298	9,000
	100	2,973	2,873	6,000
June 1933	1,000	9,565	8,565	9,500
	100	7,868	7,768	13,000
	100	4,040	3,940	4,800
30,	5,000	84,677	79,677	95,000
July 1933	10,000	182,771	172,771	170,000
	950	4,283	3,333	4,600
	10,000	78,121	68,121	90,000
	200,000	263,657	63,657	410,000
	350	4,539	4,189	3,900
	4,500	4,698	198	4,700
	2,100	13,731	11,631	12,000
Aug. 1933	1,800	13,470	11,670	12,000
Totals	$497,550	$3,834,124	$3,336,574	$4,762,575

TABLE IV[1]

New York Title & Mortgage Company
Foreclosures Resulting in Sales of Properties to Outsiders

Month	Year 1931 Units	Year 1931 Amount of Mortgages	Year 1932 Units	Year 1932 Amount of Mortgages	Year 1933 Units	Year 1933 Amount of Mortgages
January ..	3	$ 26,000	3	$ 17,750	3	$ 30,000
February .	3	25,700	2	27,250	0	0
March ...	5	48,500	3	42,750	1	13,000
April	4	40,250	1	2,000	1	120,000
May	6	57,000	0	0	1	15,000
June	3	18,500	2	10,750	0	0
July	9	360,150	2	359,500	0	0
August ...	3	24,000	1	4,500	1	32,000
September.	3	442,375	1	3,800	1	9,000
October ..	3	16,250	1	85,000	0	0
November.	1	16,500	3	28,400	0	0
December.	5	59,725	1	6,000	2	162,000
Total	48	$1,134,950	20	$587,700	10	$381,000

Foreclosures Cancelled Resulting in Sales of Properties to Mortgage Company or for Account of Holders of Participations in Mortgages

January ..	28	$ 3,029,250	67	$ 2,139,400	155	$ 6,304,030
February .	24	270,800	78	2,402,450	136	4,330,570
March ...	28	856,400	67	1,706,315	26	1,009,175
April	31	1,933,850	93	3,395,300	20	313,675
May	38	832,410	63	5,510,255	53	811,215
June	19	265,300	94	4,262,700	15	2,941,277.98
July	31	919,650	109	3,847,050	35	11,145,625
August ...	28	3,918,400	93	4,620,560	10	254,650
September.	43	1,378,000	116	3,770,905	16	200,000
October ..	41	1,875,775	114	9,199,760	17	218,673.93
November.	47	1,539,900	111	7,346,395	23	930,800
December .	43	516,250	160	6,037,555	16	163,035
Total	401	$17,335,985	1165	(A)$54,238,645	522	(B)$28,622,726.91

(A) Includes 155 Units—Mtges $8,026,245 acquired for a/c Gtd Holders
(B) Includes 162 Units—Mtges $4,269,283.93 " " " " "

[1] Plaintiff in each of these foreclosure actions was the New York Title & Mortgage Company. The properties bought in by the N. Y. T. & M. Co. were in the names of Land Estates, Inc. and Liberdar Holding Corp., two wholly owned subsidiaries. Records on file at office of N. Y. T. & M. Co., No. 141 Broadway, New York City, N. Y.

TABLE V

One Hundred and Seventy-two (172) Applications for Deficiency Judgments (Pursuant to Ch. 794, L. 1933) in Mortgage Foreclosure Proceedings from April 1st, 1936, to December 31st, 1936, in which the Mortgage Commission of the State of New York was Applicant[1]

Amount of Mortgage	Amount of Deficiency Judgment	Amount of Mortgage	Amount of Deficiency Judgment
$ 89,000.	$ 15,189.70	$130,000.	$ 47,160.83
70,000.	35,152.95	64,050.	33,822.10
40,000.	18,898.59	4,250.	26.04
62,500.	16,870.37	5,500.	denied
837,000.	denied	50,000.	8,576.58
35,000.	5,585.31	159,500.	41,155.95
95,000.	22,764.85	4,250.	denied
272,250.	156,984.67	6,500.	"
3,750.	1,629.02	8,000.	"
7,500.	3,657.55	72,500.	"
7,500.	denied	4,250.	"
18,000.	"	6,750.	859.14
15,000.	"	216,250.	denied
5,500.	1,380.12	66,500.	15,029.67
598,000.	170,867.73	4,250.	869.37
7,500.	4,183.25	33,500.	10,552.81
9,000.	1,845.18	4,250.	2,168.59
250,250.	23,875.41	75,000.	10,461.53
250,250.	19,554.17	10,500.	3,974.74
640,000.	317,793.68	6,500.	1,830.15
250,250.	49,306.34	3,500.	1,710.48
250,250.	54,027.75	12,500.	denied
200,000.	41,108.14	4,750.	642.63
9,000.	175.23	12,100.	denied
6,500.	denied	3,850.	2,297.55
140,000.	"	32,500.	9,135.42
30,000.	5,564.43	5,500.	750.00
20,000.	13,749.08	6,000.	1,522.53
3,750.	denied	12,000.	denied
3,750.	361.54	7,750.	"
3,750.	denied	10,750.	"
150,000.	20,588.55	3,250.	738.99
5,750.	denied	20,000.	denied
3,750.	590.21	35,000.	"
4,750.	denied	6,000.	309.27
7,750.	"	9,000.	denied

[1] These figures come from public records on file in the office of the State Mortgage Commission, 346 Broadway, New York City, N. Y.

Amount of Mortgage	Amount of Deficiency Judgment
$ 3,500.	denied
3,750.	567.98
3,750.	107.61
4,250.	229.04
4,250.	2,285.50
3,750.	347.88
3,750.	294.05
4,500.	700.88
4,750.	denied
3,500.	"
4,750.	"
4,500.	1,351.12
5,750.	1,425.46
3,500.	729.23
9,500.	2,581.68
5,500.	denied
3,250.	"
2,750.	397.29
22,500.	denied
59,250.	"
90,000.	5,364.43
3,850.	denied
6,000.	"
9,000.	1,473.70
12,500.	2,307.09
5,750.	1,771.99
3,250.	2.78
18,000.	746.96
4,500.	847.80
5,750.	1,512.26
4,500.	754.12
6,750.	denied
4,750.	546.73
5,250.	denied
2,750.	1,035.61
3,500.	1,215.32
1,900.	519.19
3,500.	680.30
4,250.	1,980.31
13,500.	5,502.22
6,500.	1,966.57
6,500.	2,168.60
4,250.	1,465.48
6,000.	979.72

Amount of Mortgage	Amount of Deficiency Judgment
$ 5,500.	denied
20,000.	"
2,000.	"
5,750.	2,945.66
4,500.	1,164.22
7,750.	denied
17,000.	"
4,000.	1,185.65
11,000.	4,829.51
3,750.	denied
4,500.	412.64
5,250.	1,443.68
97,000.	23,192.93
2,750.	1,445.51
3,250.	969.57
4,200.	930.98
42,500.	denied
3,500.	"
14,000.	5,383.12
4,200.	2,398.23
3,250.	1,679.35
4,500.	164.79
4,000.	denied
3,500.	831.26
7,000.	1,128.47
8,000.	denied
3,750.	"
8,500.	579.17
3,750.	denied
4,250.	"
4,750.	360.72
219,600.	denied
5,750.	1,983.82
3,500.	denied
3,250.	1,165.11
4,500.	denied
4,500.	"
3,250.	300.00
3,250.	958.59
30,000.	denied
7,200.	"
9,550.	"
145,500.	23,653.92
166,000.	29,009.55

Amount of Mortgage	Amount of Deficiency Judgment	Amount of Mortgage	Amount of Deficiency Judgment
$ 25,000.	denied	$ 22,500.	denied
116,400.	88,241.10	15,000.	"
3,500.	denied	9,000.	3,816.56
124,900.	82,194.19	200,000.	59,879.90
85,000.	21,194.90	3,700.	163.19
4,500.	denied	4,000.	denied

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF OF AMICUS CURIAE.

WILLIAM GILLIGAN,
Amicus Curiae.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF OF AMICUS CURIAE.

Summary.

This brief urges that under conditions existing in 1933, when mortgagees in foreclosure actions invariably became the purchasers upon a sale of the mortgaged property, the New York Supreme Court, having been endowed with the powers of the English court of chancery, was competent to decree that the reasonable and fair market value of the property be credited against the mortgage indebtedness; that there was implicit in mortgage contracts previously made, a reservation subjecting the contracts to the possible exercise of this power, and that in decreeing the manner in which the power should be exercised, the New York Legislature merely gave effect to the implied reservation and did not impair the obligations of the contract.

POINT I.

The provisions of Chapter 794 New York Laws, 1933, do not impair the obligations of contracts.

In order to determine whether the statute of which the appellant complains is unconstitutional as impairing the obligations of contract, it is necessary to determine what these obligations were. They are not to be found within the four corners of the written instrument itself, but necessarily comprehend all the rules of law and principles of equity which existed in the State of New York at the time the contract was made.

> "* * * Into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and the higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."
>
> *Long Island Water Supply Company* v. *Brooklyn* (1896), 166 U. S. 685-92;
> *Home Building and Loan Association* v. *Blaisdell* (1933), 290 U. S. 398-435.

Thus, there was implicit in the several instruments constituting the mortgage contracts now before the

Court, the principles of equitable jurisprudence, obtaining in the State of New York at the time the contract was made. These principles were those developed in the English courts of Chancery, with the exceptions, conditions and limitations created by the New York Constitution and the statutes of the Legislature.

The first constitutions adopted by the State of New York in 1777 and 1822 assumed by reference the existence of a Supreme Court with general jurisdiction in law and a separate court of chancery (II Lincoln Constitutional History of New York 151). The revised statutes of 1830 (5th Ed. Pt. III, Ch. 1, Tit. 2, Art. 2, §42, p. 264) provided that

> "the powers and jurisdiction of the court of chancery are coextensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, conditions and limitations created and imposed by the Constitution and laws of this State."

Section 3, Article VI of the Constitution of 1846 provided (I Lincoln, *ibid.* 249)

> "There shall be a supreme court having general jurisdiction in law and equity."

the effect of which was to transfer to the Supreme Court the equity jurisdiction of the earlier Court of Chancery. *Sherman* v. *Felt* (1849), 2 N. Y. 186.

This court was continued by the amendment of 1869 (I Lincoln, *ibid.* 285), the amendment of 1879 (I Lincoln, *ibid.* 314), and as Section 1 of Article VI in the present constitution of the State of New York now reads (2 McKinneys Consolidated Laws):

> "the Supreme Court is continued with general jurisdiction in law and equity, subject to such ap-

pellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this Article."

And Section 3 of the same article provides:

"* * * except as herein otherwise provided, * * * the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised."

This provision first appeared in the constitution of 1846 (I Lincoln, *ibid.* 250) and was included in the amendment of 1869 (I Lincoln, *ibid.* 286).

In the courts of chancery, contracts representing mortgage transactions have always been *sui generis.* And it is elementary learning that the obligations which mortgage contracts purport to establish are subject to the inherent power of chancery to vary or impair them for the purpose of avoiding an abuse of the contract rights by either party and of promoting the ends of justice. The history of mortgages is a succession of cases in which this power has been exercised.

Originally our present mortgage was a conveyance to secure a debt conditioned upon repayment; if repayment was not made, the title became absolute (Littleton, Sec. 332). The chancellor first began setting aside these forfeitures and allowing the mortgagor to redeem, when they occurred from mistakes, accidents or other adventitious circumstances (Cary's Reps. 1, *circa* 1560). Thus began the equity of redemption which thereafter was gradually extended so as to cover all defaults as a matter of course (*Emmanuel College* v. *Evans* (1626) 1 Rep. in Ch. 18), and it was said if necessary to continue unto the "tenth generation" (*Bacon* v. *Bacon* (1639) Tothill, 133). But it became customary for the mortgagee to ask that the chancellor give a decree foreclosing

the right to redeem within a given time (*How* v. *Vigures* (1628) 1 Ch. Rep. 32), or under unusual circumstances to direct a sale of the property (*Booth* v. *Rich* (1684) 1 Vern. 295). Attempts to formulate or phrase the contract so as to escape the chancellor's powers were fruitless because "once a mortgage, always a mortgage" (*Newcomb* v. *Bonham* (1681) 1 Vern. 7). At first merely a right accorded to mortgagors, the right became transferable (*Rosecarrick* v. *Barton* (1672) 1 Ch. Cas. 217) which provoked Chief Justice Hale to complain that "by the growth of equity upon equity, the heart of the common law is eaten out, and legal settlements are destroyed", in spite of which Lord Hardwicke later held the interest of the mortgagor to be an estate (*Casborne* v. *Scarfe* (1737) 1 Atk. 603).

Upon a proper showing of facts, the Chancellor did not hesitate to postpone from time to time the entry of the decree foreclosing the equity of redemption (*Cocker* v. *Bevis* (1665) 1 Chan. Cas. 61); *Lant* v. *Criste* (1719) 5 Bro. P. C. 200; Anon. (1740) Barn. C. 221; *Wakerell* v. *Delight* (1803) 9 Ves. Jr. 36; and *Edwards* v. *Cunliffe* (1815) 1 Madd. 287). Some of these extensions were for as much as 2 years and always appear to have been given on condition that the interest and costs be paid up to date of the various extensions. In *Cocker* v. *Bevis,* it was said at page 63,

> "And it appears that this court has very often in like cases of inevitable necessity, and no wilful default appearing in the party, enlarged the time as to the performance of its decrees."

If a mortgagee foreclosed the equity of redemption and then sued at common law upon a bond "given at the same time for the payment of money", this reopened the equity of redemption (*Dashwood* v. *Blyth-*

way (1729) 1 Eq. Cas. Abr. 317). If he had divested himself of title to the property, his action would be enjoined and the bond deemed to have been paid (*Perry* v. *Barker* (1803) 8 Ves. Jun. 527 and (1806) 13 Ves. 198). But if he still had title to the property it appears that he could sue on the bond, because the redemption was thereby reopened, and by collecting on the bond, the property would be redeemed. (*Took* v. *Hartley* (1784) 2 Bro. C. C. 125, as discussed 8 Ves. Jun. 527). These decisions must be considered in relation to the limitations in England on the rights of a judgment creditor against real estate. (Herman, Law of Executions ed. 1878, §§15 *et seq.*)

In Massachusetts a divergent doctrine developed when it was decided at an early date that a mortgagee who had foreclosed could sue upon the bond for the difference between the amount of the debt and "the value of the land according to appraisement". (*Amory* v. *Fairbanks* (1793) 3 Mass. 562.) This doctrine was adopted by Judge Story, sitting in the Federal Court, in *Hatch* v. *White* (1814) 2 Gallis. 152, after examining the decisions in *Took* v. *Hartley* (*supra*) and *Perry* v. *Barker* (*supra*).

In New York, it became the usual practice for the Chancellor to decree a sale of the property in lieu of foreclosure, and direct that any surplus be paid to the mortgagee, or allow the mortgagee to recover on his bond for any deficiency. The history of the practice was set forth by Chancellor Jones in *Lansing* v. *Goelet* (1827) 9 Cow. 346, where the power of the court to direct a sale was unsuccessfully challenged as being contrary to precedent.

The New York Legislature in 1830 (II R. S. 312, Sec. 57) abolished the action of ejectment by a mortgagee which prompted Chancellor Kent to suggest that

the effect was to transfer to chancery, jurisdiction over the debt as well as the security (4 Kent Com. 9th ed. 185). This suggestion later found expression in *Trimm* v. *Marsh* (1874) 54 N. Y. 599 which established the so-called lien theory of mortgages.

All these steps in the history of the law of mortgages are examples of the manner in which the power of a court of chancery was employed to vary the obligations of a mortgagor or mortgagee for the purpose of avoiding an unjust result. Allowing the mortgagee to redeem, foreclosing the equity of redemption, disregarding all efforts to achieve forfeiture through other means, erecting the mortgagor's rights into an estate, enjoining the mortgagee from suing on his bond, limiting the mortgagee's right on his bond to a difference between the amount of the bond and the value of the foreclosed property, decreeing that the property should be sold, finally converting the mortgage into a mere lien regardless of the form of the contract—each was a step representing a new exercise of power which was never successfully questioned. In every case where the report is sufficient to indicate the reasoning of the court, the question considered was not whether it possessed the power, but whether as a matter of policy or circumstance the power should be exercised.

In *Hatch* v. *White* (*supra*) Judge Story considered the English doctrine of *Took* v. *Hartley* (*supra*) and *Perry* v. *Barker* (*supra*), disagreed with them and, concluding that the court had power to adopt a doctrine more consonant with the conditions in Massachusetts, held that a mortgagee who had obtained the mortgaged property by a decree of foreclosure, could nevertheless sue on the bond for the difference between the amount of the bond and the reasonable value of the mortgaged property. The Court said at page 158:

"We should have thought that natural justice as

> well as the stipulation of the parties would have been better conserved by allowing the creditor every remedy *in rem* and *in personam* until his debt should be completely satisfied. *If, afterwards, he should make an oppressive use of his power by attempting to obtain a double satisfaction, then and not until then, the intervention of chancery by way of injunction would be conscientious and salutory.*"*

In *Lansing* v. *Goelet* (*supra*) the Chancellor in an exhaustive review of English and American cases, constantly emphasized the principle that the court of chancery had the power to adapt its decrees to changing needs; he said at page 370,

> "But it is said that the practice of this court in decreeing the sale of mortgaged premises, when it was introduced, was an innovation upon the course of proceedings in the English court of chancery; and how far it may be so, I propose presently to inquire. But if it was so, it violated no rule of law, but was in conformity to the principles of equity applicable to the contract of debtor and creditor; and this court, therefore, in adopting it, acted up to its own principles, and did no more than mete to the mortgagee the measure of equity to which he was entitled."

and at page 375, after referring to *Mondey* v. *Mondey* (1813) 1 Ves. and B. 223;

> "Here was an assertion by the Chancellor, of the power of the court to depart from the usual course of proceedings, at his discretion, and decree a sale instead of a foreclosure of the mortgaged premises, if the exigencies of the case require it;

---

* Italics by counsel.

> and he declared, that notwithstanding * * * the counsel praying for a sale could not produce an instance where it had been done; yet, the chancellor, knowing that he possessed the power, and seeing that justice to the party called for its exercise, very properly determined to grant the prayer for a sale; and declared, that if there was no precedent for it, he would make one. And lamentable, indeed, would be the condition of suitors, if the court was precluded by the mere course of practice from deviating from the beaten track, and moulding the exercise of its legitimate powers, and adopting its decrees to the exigencies of cases as they arise, to accomplish the purpose of equity and justice."

and at page 383:

> "*It is certainly not just to permit the mortgagee to extort a double satisfaction from the mortgagor;* but it is surely unjust to deny him the benefit of an inadequate security towards the payment of the debt, and because he is unwilling to accept it as full satisfaction. To obviate these embarrassments, and to enable him to pursue his remedy at law, without waiving the benefit of his decree, it is desirable to provide some method of applying the value of a pledge to the satisfaction of the debt; and thus to leave him at liberty, if still unsatisfied, to take his remedy against the mortgagor for the deficiency."

The court conceived itself to be justified in granting a decree of sale, though contrary to practice, for the purpose of protecting the mortgagee from injustice; conversely that same power could be used by the court for the purpose of preventing the double satisfaction to which reference was made. The prevailing opinion in the Court of Errors, in affirming the decree of the

chancellor expressly mentioned the reserve power of the court at page 402:

> "In case of any calamity, such as hostile invasion, or extreme sickness prevailing in the place of sale at the time, the court will interfere and postpone it."

Even in *McGowan* v. *Sandford* (1841) 9 Paige 290, the one case which is frequently cited as authority for the proposition that equity will not interfere with a foreclosure sale by reason of economic conditions, Chancellor Walworth did not hold that equity did not have the power to interfere, but only that the facts in the case were insufficient grounds for suspending the sale. He cited as authority *Astor* v. *Romayne* (1814) 1 Johns. Ch. 310, where the Court was asked to delay a sale of mortgaged premises because of alleged fear of invasion during the war of 1812. The court granted a delay of 2 months saying at page 312:

> "If there were sufficient evidence of the existence of an immediate calamity, present or impending, over the city, such as invasion by the enemy or extreme sickness which would suspend all civil business, the court ought to interfere and postpone the sale. But such a case does not exist. The apprehension of danger from the enemy is too slight, from anything that has been shown to the court, to warrant the granting of the motion to any considerable extension."

The maxims of equity are redolent of this power. "Equity will regard that as done which in good conscience ought to be done" (1 Pomeroy on Equity, Sec. 376); "Equity looks at the intent rather than form" (*ibid.* Section 382); "Equity will not suffer a wrong without a remedy" (*ibid.* Section 423); and from the Irish court of chancery: "Equity will not suffer a

double satisfaction to be taken" (Francis, Maxims in Equity).

Such being the power of a Court of Equity, it is necessary to consider the extent to which this power may have been circumscribed by the New York Legislature, as provided in Section 3, Article VI of the Constitution.

At the time when the bond in suit was taken, the statute law relating to mortgages on real property and the foreclosure thereof was contained in Articles 8 and 10 of the New York Real Property Law (Ch. 52, Consolidated Laws); Article 4, Title I, Ch. 14 (Secs. 1626 to 1637 inc.) and Title 9, Ch. 17 of the Code of Civil Procedure, and possibly Rules LX to LXIV inclusive of the Rules of General Practice.

Article 10 of the Real Property Law related to the discharge of ancient mortgages. Article 8 provided for a short form of mortgage, which is permissive but not mandatory, and singularly enough, construes the form to be that of an absolute conveyance with a defeasance clause in essentially the same manner as it has been employed in English law for centuries (Sec. 254). It therefore follows that any limitation which may have been imposed upon the chancery powers of the court must be found in the Code of Civil Procedure and the Rules pertaining thereto.

Title 9, Ch. 17, of the Code of Civil Procedure related to foreclosure by advertisement under a power of sale.

Of the twelve sections in the Code dealing with the foreclosure of mortgages by action, only Section 1626 operated to limit the equity power of the court. That section reads as follows:

> "In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged * * *."

This section made it mandatory that a mortgagor's rights be foreclosed by sale, and in effect precluded a strict foreclosure. By the decision of *Lansing* v. *Goelet* (*supra*), the court had already committed itself to this method of foreclosure as a general practice, and consequently the statute was in large measure declaratory (*Bolles* v. *Duff* (1871), 43 N. Y. 469). The remaining sections, to the extent that they do not cover secondary matters, operate to extend the jurisdiction of equity over the mortgage indebtedness, which in earlier days had been wholly within the common law jurisdiction. Thus Section 1627 provides that persons liable on the mortgage debt whether or not they were interested in the mortgaged property, could be made parties and the court was authorized to enter judgment against them for any deficiency between the mortgage debt and the proceeds from the sale of the property. Although Section 1626 provides that foreclosure *must* be by sale Section 1627 states that the court *may* enter a deficiency judgment, thereby implying that there are cases when it need not enter judgment for a deficiency. The other sections were designed to encourage the assertion of all claims in the foreclosure action, to permit the mortgagor to cure defaults in installment payments, and to dispose of surplus proceeds from a sale.

General Rules of Practice in New York were adopted by the justices of the Supreme Court pursuant to a power conferred by the Code, and were considered to give construction to the statute (*Myers* v. *Feeter* (1850), 4 Pr. Rep. 240). So far as these rules represent an exercise of legislative power, it was possible for them to change the jurisdiction of a court of equity. Rules LX to LXIV inc. have to do with mortgage foreclosures. Rule LXI specifies what a judgment of fore-

closure shall contain. It is mandatory only as to the description of the mortgaged property. Its provisions as to matters affecting substantive law are indirect and expressly made subject to the discretion of the court. This is important and significant because the rule reads:

> "*And unless otherwise specially ordered** by the court the judgment shall direct * * * that the plaintiff or any other party may become a purchaser at such sale."

It is apparent that in drafting this rule any inference that the mortgagee was to have an absolute right of purchasing the mortgaged property at a foreclosure sale was sedulously avoided (p. 16, *infra*).

Thus it is seen that the mortgage transaction in the case at bar occurred at a time when the principles of equity as developed by the English Court of Chancery in relation to mortgages was part of the law of the State of New York, except that the process of foreclosing the mortgagor's rights was limited to a sale as opposed to any other method which equity may have resorted to. On the other hand the power of equity had been extended to include the mortgage indebtedness, and to deal with the mortgaged property *in rem*, that is, by giving a deed to the property to effectuate the sale without requiring execution by the mortgagor and mortgagee.

This broad power of the court of equity has frequently been recognized by the New York Courts.

In *Youngs* v. *Carter* (1877) 10 Hun 194, it was said at page 196:

> "It has been claimed on behalf of the defendants appealing, that this court, as a court of equity, had

* Italics by Counsel.

no power to make the determination which resulted in the judgment, and several authorities were cited and relied upon in support of that proposition. But it will not become necessary to enter into any discussion of them for the purpose of making a proper disposition of this case; for even if it should be conceded that the jurisdiction of the court cannot be enlarged by its own inherent authority, no practical difficulty could result from the concession; for it now extends to all cases of law and equity, by virtue of the provision of the Constitution defining its power (Const. of 1846, art. 6, §3). The authority given, in terms is, 'general jurisdiction in law and equity'; and that, of necessity, includes all cases which may be properly comprehended by established and existing equitable principles. The test of jurisdiction cannot be restricted to the existence of some definite precedent for the action which may be brought. That would destroy the flexibility required to maintain the utility of the court, in the demands necessarily made for the exercise of its authority in new cases always arising out of the enterprises and progress of society. The novelty of the case can form no well-founded objection to the jurisdiction over it, if it falls within the limits of any defined equitable principle. That must constitute the test of the court's authority, and not the existence or absence of precedent for the case over which it may be invoked. Those principles are as broad as the just wants and necessities of civilized society required; and it is scarcely possible to imagine a case in which equitable relief may be proper which they do not include."

In *Graf* v. *Hope Building Corp.* (1930) 254 N. Y. 1, in discussing the equitable power of the court Chief Judge Cardozo said at page 13:

"Let the hardship be strong enough, and equity

will find a way, though many a formula of inaction may seem to bar the path."

Although a majority of the court in that case disagreed with its learned Chief Judge and his dissenting associates, the disagreement was on a question whether the power should be exercised and not whether it existed.

This power could have been applied in the present emergency and identically the same results obtained as have followed the application of Chapters 793 and 794 of the Laws of 1933. The difference would have been that the process of having the court declare the circumstances under which the power should be exercised would have been much slower, with many injustices occurring in the meanwhile. The large number of courts exercising plenary equitable powers and the delay incident to delineating the conditions attending such exercise made it much more expedient for the Legislature to act.

The evil which was to be corrected arose from the fact that the market for real property had become so demoralized there were no actual bidders at the foreclosure sales which the statute required. The only bidder was the mortgagee or his nominee. This permitted the mortgagee solely in his discretion to determine the amount of the deficiency which under ordinary circumstances would be entered against the persons liable for the mortgage debt, and thereby permitted the mortgagee to be the judge of his own cause. He could acquire for a nominal sum, fixed only by his will, a property on which the mortgagor had been compelled to pay taxes determined by a very substantial valuation, and in addition, he could obtain a personal judgment for a sum almost as great as the amount of the mortgage. The problem was quite the same as confronted the Chancellor on previous occasions when mortgagees attempted to foreclose the equity of redemption and then procure

a judgment on their bonds. The results were not only unconscionable, but conditions had made the methods of arriving at them contrary to the most fundamental postulate of our jurisprudence, namely, that a man shall not be his own judge.

This condition was intolerable, and when it had arisen on previous occasions in less acute forms, equity had employed its power to correct it. The idea of delaying a foreclosure while the mortgagee received his interest and costs was not new (p. 5, *supra*), and the idea of preventing a recovery on the mortgage indebtedness of an amount greater than the difference between the debt and the reasonable value of the property had also been given expression (p. 7, *supra*).

So far as the deficiency judgments were concerned, the key to the whole situation lay in the fact that both suitors and courts seem to have assumed that mortgagees had an absolute right to be purchasers at foreclosure sales when such sales were conducted by the court. This weakness in our system of foreclosing mortgages has been pointed out by an English commentator on the various efforts to provide mortgage relief, *R. W. Turner,* 21 Va. L. Rev. 601.

But in New York a mortgagee has no absolute right to become the purchaser in an action to foreclose, neither at the time the appellant's mortgage was delivered, nor at present. Such right as exists, and has existed, has been expressly made subject to the discretion of the court. Rule LXI of the General Rules of Practice (currently Rule 259 of the Rules of Civil Practice) provided that unless the court directed otherwise, the judgment should provide that the mortgagee might be the purchaser (p. 13, *supra*). This provision first appeared in the General Rules of Practice adopted by the

justices of the Supreme Court under the Code of Procedure of 1849, and seems to have reflected the practice which prevailed in the Court of Chancery prior to its merger with the Supreme Court in 1846. It gains special significance from the fact that in 1827 the Court of Errors had decided that a purchase by the mortgagee did not vitiate the sale, *Lansing* v. *Goelet* (*supra*). In England it had been decided that a mortgagee bringing about a sale of the property under a power of sale could not be the purchaser (*Downs* v. *Grazebook* (1817) 3 Mer. 200), which was a rule derived from certain analogies between a mortgagee and a trustee (Jones on Mortgages, 8th Ed., Secs. 2078, 2101 and 2417). Hence, there has always been reserved to the New York courts the power of withholding from mortgagees the privilege of being purchasers at judicial sales foreclosing their mortgages, or of granting such privileges conditionally.

As to the instant case, it would have been competent in the foreclosure action prior to entering its judgment, for the court to have taken testimony as to the intrinsic value of the property, and to have denied to the mortgagee the privilege of being the purchaser at the foreclosure sale at a price less than such valuation. Theoretically, if the mortgagee failed to exercise his limited privilege, and no bid was received for the property, the court could adjourn the sale until such a market had developed as to make a sale possible. As a practical matter, however, the mortgagee would have purchased the property at the minimum price specified in the judgment because otherwise, when the sale occurred, he would have lost the property which constituted his basic security, and would have had in its place only a personal judgment on which he would have no assurance of collection. Conversely, if the mortgagee had first proceeded on his bond and obtained a judg-

ment, and then sued to foreclose, his privilege of being the purchaser could have been conditioned upon his crediting the value of the property against the judgment on the bond. Moreover, the Legislature was free to provide that the action on the bond and the foreclosure action must be prosecuted at the same time and such a statute being purely procedural would not have impaired the obligation of contract. (*National Surety Co.* v. *Architectural Co.* (1912) 226 U. S. 276-283; *Oshkosh Water Works* v. *Oshkosh* (1902) 187 U. S. 437-439; *New Orleans C. & L. R. R.* v. *Louisiana* (1894) 157 U. S. 219-224.)

If the mortgagee did not wish the value of the property credited against the mortgage indebtedness, or to hazard the chance of losing the property entirely through purchase by a stranger, he could have deferred his action to foreclose until the court relaxed its rules by removing the condition from the privilege of being a purchaser.

The results achieved in this manner would have been identical with those obtained under Ch. 794, L. 1933. The procedure varies somewhat but is strikingly parallel. By the statute the condition is imposed on the confirmation of the sale, and the mortgagee is permitted to purchase the property unconditionally. The court determines the intrinsic value of the property after the sale rather than before. If the mortgagee is the purchaser, this value fixes the amount of the credit to which the mortgagor is entitled. If the mortgagee does not bid, and there is no other bid, the statute is silent on what is to be done, and the court would necessarily have to postpone the sale. If, when a sale does take place, the mortgagee does not bid and the property is purchased by a stranger, the court would undoubtedly consider the selling price its market value in determining the credit which should be allowed to the mortgagor.

There remains the question of foreclosures by advertisement under a power of sale (Tit. 9 Ch. 17, Code of Civil Procedure, and currently Art. 17 New York Real Property Law). Section 2394 of this title reads:

> "The mortgagee or its assignee, or the legal representative of either, may, *fairly and in good faith,* purchase the mortgaged property or any part thereof at the sale."

The statute contains no provision for deficiency judgments. It must be strictly construed (*Deutsch* v. *Haab* (1909) 135 App. Div. 756) and although it has been on the books for many years (Ch. 156 Laws, 1808), its provisions are so onerous and technical that the practice has not been generally used and the number of cases construing it is relatively small. By its express terms, the mortgagee may become the purchaser *fairly and in good faith.* Where conditions are such that the mortgagee will inevitably be the only bidder, the sale cannot be made fairly and in good faith because the selling price would be determined only by the whim of the mortgagee. It is within the power of equity to anticipate and prevent a wrong (*Vicksburg Water Co.* v. *Vicksburg* (1902) 185 U. S. 65) and under such circumstances the court could, in defining "fairly" determine the fair value of the premises and enjoin the mortgagee from purchasing them at a lower figure.

It should also be borne in mind that a mortgagee who does not wish to get title to the mortgaged property as a "bargain" invariably has the opportunity of arranging for the rents from the property to be trusteed so that they may not be diverted, and in countless cases this has proved a most satisfactory arrangement for the benefit of all concerned.

If at the time of making the contract sued, on the court had the power by its decrees to modify the

manner of performance, such modification necessarily takes place in pursuance of the terms of the contract and not in impairment of its obligations. The fact that instead of acting on its own motion the court responded to an enactment of the Legislature, when the Legislature has at all times enjoyed the power to alter the jurisdiction and procedure of the court does not make the alteration any more an impairment than if the court acted without suggestion from the Legislature.

In *Doty* v. *Love* (1934) 295 U. S. 64, where the legislature had enacted a statute providing that the court of chancery should do that which the court for many years had been empowered to do, it was said by Mr. Justice Cardozo at page 73:

> "The jurisdiction of the court of chancery to give approval to a settlement by a receiver or other officer did not have its genesis in the Act of 1932, or in the procedure there prescribed. It existed in like measure when the liquidation of the bank was begun in 1930 and for many years before. *Depositors were chargeable with notice of that power and became subject to its exercise in making their deposits.*"*

Similarly in the case at bar, the appellant was chargeable with notice of the power of the court of equity to modify the manner of performing mortgage contracts, and in making the contract the appellant acceded to the possibility of such power being exercised, whether it be activated by the voluntary disposition of the court, or by a declaration of the Legislature.

For these reasons the statute did not impair the obligations of the appellant's contract.

Respectfully submitted,

WILLIAM GILLIGAN,
Amicus Curiae.

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* Italics by Counsel.

JAN 13 1937
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

against

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, deceased,

Appellee.

BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC. AS *AMICUS CURIAE.*

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Supreme Court of the United States

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No. 370.

MARIAN S. HONEYMAN,
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Appellee.

BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC. AS *AMICUS CURIAE.*

The Real Estate Board of New York, Inc. is a membership corporation organized and existing under the laws of the State of New York. Its membership numbers upwards of 2400 and includes among others owners, brokers, lending institutions, managers of real estate and appraisers.

The Board sought permission to intervene since, through its members, it speaks for mortgagors and mortgagees who deal annually in transactions involving billions of dollars of real estate.

The Board is vitally interested in the important issues herein and views with alarm the grave economic consequences which may flow from an adverse determination as to the constitutionality of the deficiency judgment statute. Accordingly as *amicus curiae,* it urges that the judgment herein be sustained.

Preliminary Statement.

That the enactment of the Deficiency Judgment Law (Chapter 794 General Laws of New York 1933) constitutes

a valid and proper exercise of the reserved or police power of the State of New York has been fully treated in appellee's brief. The facts and proceedings are set forth in the record and in the briefs of the parties to this appeal.

The Nature of the Emergency.

Real estate throughout the State of New York contributed for the support of local Government approximately 65% of its total cost. (See Annual Report of New York State Tax Commission for the year 1934 Table No. 1, pp. 74 and 75.)

The burden imposed upon real estate for the support of the Government of the City of New York amounts to approximately 76% of its total cost. (See Budget, City of New York.)

In 1933 the depression had so devitalized real estate that the very foundation of the economic structure of the State and the welfare of its citizens was imperiled.

Because of the inherent characteristics of real estate and because of the historical and legal ramifications that surround its method of sale, its mode of finance and the procedure of recapture it was not subject to the precipitate and vertical decline which affected liquid securities such as stocks and bonds. Nevertheless certainly but grudgingly it yielded to the ravages of the depression until its plight had become so dire that unless the Government intervened consequences, irreparable to the citizens of the State, would ensue.

Fully cognizant of the grave situation the Governor convened a special session of the Legislature in August 1933. In his message, referring to the alarming situation with respect to mortgage foreclosures and deficiency judgments he declared

> "The problem is a most difficult one, with far-reaching ramifications and effects. If it were happily one of simply extending relief to the home owner, it would not be so difficult of solution. It is, however, tied up inextricably with the interests of virtually all other groups

of citizens, who are entitled to State protection to the same extent as are the home owners of the State."

Referring directly to deficiency judgments, he said:

"The hardship has been seriously aggravated by reason of the fact that upon foreclosure sales, deficiency judgments have been entered against home owners entirely out of line with the fair value of the property. In this way not only does the small home owner lose his home but he frequently becomes saddled with an excessive deficiency judgment for the rest of his life. The cause of these deficiency judgments is again the absence of any real estate market, and the consequent reluctance to bid on the foreclosure block."

After giving independent study to the Governor's recommendation the Legislature enacted the statute in question here and in so doing predicated its action upon a finding that

"a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination." (Chapter 794 General Laws of the State of New York 1933.)

The constant decline in real estate values and the almost complete absence of a mortgage money market had precipitated an epidemic of foreclosures. Throughout the country the rate of foreclosures rose steadily year by year, picking up new momentum in 1932 when there was almost three

times as many forced sales as there had been in 1926.[1] In the Borough of Manhattan alone in 1932 property assessed at more than a quarter of a billion dollars changed hands at foreclosure, almost six and one-half times the amount involved in foreclosures in 1928. This represented the culmination of a constantly mounting flood of forced sales. The story is graphically told in the following table:

Year	Assessed Valuation of Property Foreclosed in Manhattan	Per Cent of 1928
1928	$39,332,000	100.00
1929	67,290,000	171.1
1930	89,879,500	228.5
1931	172,332,000	438.1
1932	252,550,500	642.1[2]

The following figures have been taken from the official record of the County Clerk's Office of New York County (applicable only to the Borough of Manhattan) and show the record of judgments of foreclosure and sale beginning with the year 1925 and ending with the year 1933:

Year	Judgments of Foreclosure and Sale
1925	193
1926	369
1927	479
1928	554
1929	660
1930	750
1931	1063
1932	1655
1933	1864
Total	7587

[1] New York Times April 1, 1933, page 31; New York Herald Tribune, April 9, 1933, Section IV-V, page 10. For a general study undertaken by the Division of Research and Statistics of the Federal Home Loan Bank Board, see R. & G., April 8, 1933, page 8.

[2] Figures compiled by the State Board of Housing (R. & G., July 22, 1933, p. 5).

The full significance of this panicky trend is graphically demonstrated by a consideration of the years 1931, 1932 and 1933 alone. In these three years 4582 parcels of real estate in the Borough of Manhattan were brought to the auction block. This represented more than 6% of the total number[3] of non-tax exempt parcels in the entire Borough of Manhattan. In addition to these staggering figures it is a notorious fact that thousands of properties in difficulties were either turned over by deed to mortgagees in lieu of foreclosure or rent assignments were given.

Property of every description was swept away—commercial and residential—the latter amounting in value to $159,274,500[4] and representing 70.2% of the total amount foreclosed in 1932. No class of property was spared.[5]

Much of it came into the hands of the great lending institutions. In 1932, the year immediately preceding the mora-

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[3] Figures taken from the records of the Department of Taxes and Assessments of the City of New York disclosing 74,631 non-tax exempt parcels.

[4] R. & G., January 14, 1933, page 6.

[5]

	Percentage of the Assessed Value of Each Type of Property to the Assessed Value of the Total Foreclosed in Manhattan				
Type of Property	1928	1929	1930	1931	1932
Apartments and Tenements	68.7	62.9	61.8	52.8	61.1
Dwellings	4.8	3.2	3.6	2.4	4.2
Hotels	1.3	4.9	3.9	1.7	4.9
Lofts	12.0	15.8	13.0	14.6	12.5
Office Buildings	3.2	1.9	6.5	21.4	8.5
Stores	.3	.4	3.2	.5	.8
Theatres and Halls	1.5	4.4	1.2	.6	3.1
Garages and Stables	2.4	.5	1.1	2.4	.7
Vacant Land	.4	.8	.2	.4	.5
Miscellaneous	5.4	5.2	5.5	3.2	3.7
Total	100.	100.	100.	100.	100.

These figures are found in R. G., September 8, 1934, page 8.

torium, they acquired at foreclosure sale 542 Manhattan properties assessed at $102,677,700.[6]

In many instances, these institutions had no choice but to foreclose, irrespective of whether it was to their best interest:

> "* * * Bankers are not free agents. They are frequently compelled by law to resort to foreclosure proceedings in the interest of beneficiaries of trust funds in cases where it is apparent that foreclosure will not only cause further misadjustment but perhaps ultimately bring a burden instead of a benefit to the mortgagee. So long as they exercise a diligence in following the prescribed legal procedure, trustees are held harmless in the eyes of the law quite irrespective of the social consequence of their actions."[7]

Effect of Foreclosures

This ever swelling flood of forced sales benefited no one. Mortgagors were rapidly being wiped out. Their properties, originally mortgaged for only about two-thirds of their value, were bid in at purely nominal figures. Accordingly the mortgagor not only lost his property but still remained liable for nearly the entire mortgage debt. Although many valiantly managed to pay up on interest and taxes, their land was none the less swept from under them for, at a time when all debtors were harassed beyond endurance, they were unable to pay installments of principal or the principal itself as it came due. The small and responsible home owner who had saved to buy a house, putting all his ready cash into it and giving back a $5,000 or $6,000 mortgage, found himself without a home.[8]

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[6] Norbert Brown, Statistical Analysis of Manhattan Real Estate Trends, R. & G., January 6, 1934, page 8.

[7] Holden, *The Menace of Mortgage Debts*, Harper's Magazine, April 1933, page 576.

[8] See Article by Douglas L. Elliman, New York Times, Section 10, April 9, 1933, page 2.

This extensive distress liquidation of real estate meant ruin not only for real property owners. It threatened even more widespread and disastrous effects. Institutional investors were rapidly being forced to become real estate operators on an unprecedented scale.[9] Since there was no market for the property which they acquired, their assets tended constantly to become less liquid. And the value of the assets began to shrink dangerously. The ever-increasing number of forced sales caused new lows in value levels.[10] Foreclosure receiverships caused rents to be fixed at rates with which owners of undefaulted equities could not compete and gave further impetus to this process of devastating devaluation. As mortgagees bought in more and more property at their own figures, a steady demoralization of all land values in the vicinity took place.

As was stated by the Court of Appeals:

> "There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security, owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property but the value could not be obtained nor anything like it." (Klinke v. Samuels, 264 N. Y. 144, 149.)

The result was inevitable. Deficiency judgments mounted in direct inverse ratio to the abnormally depressed value of the property. As more and more mortgagors were saddled

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[9] "Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934) at page 445.

[10] Burton, *Foreclosure of Properties in Manhattan*, 1928-1934 (Institute for Economic Research) 1934, page 5. See articles in New York Herald Tribune, September 2, 1934, Section x, page 1; New York Evening Sun, February 9, 1933, at page 48.

with these judgments the chaos of the real estate market increased.

The need of this emergency legislation was apparent. Its effect as time has shown was salutary and justified. It did nothing more or less than to recognize what every one knew, to wit: that real estate in 1933 had no market on the auction block or elsewhere and substituted a just and reasonable method of determining the value of property and of saving owners from the imposition of unjust judgments which they never could hope to satisfy and which when entered contributed to the vicious circle of chaos caused by the depression.

CONCLUSION.

The judgment appealed from should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 370.—October Term, 1936.

Marian S. Honeyman, Appellant,
vs.
Herbert G. Hanan, as executor of the last will and testament of Herbert W. Hanan, deceased.

Appeal from the Supreme Court of the State of New York.

[February 1, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Upon the filing of the jurisdictional statement, the appellee moved to dismiss the appeal upon the ground that the decision of the federal question now raised was not necessary to the determination of the cause. Rule 12, par. 3. Further consideration of the motion was postponed to the hearing upon the merits.

The record is brief. The suit was brought against the executor of the estate of Herbert W. Hanan, deceased, to recover a deficiency judgment upon a bond secured by a mortgage which had been foreclosed in an earlier suit in which the mortgaged property had been sold and an application for a deficiency judgment had been refused. The judgment in the present suit dismissed the amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The amended complaint alleged that in 1907 the John H. Hanan Realty Company, with John H. Hanan, had executed a bond for $118,000, and as collateral security the John H. Hanan Realty Company had made a mortgage covering certain premises in the city of New York; that later the bond and mortgage were assigned to John H. Hanan; that in 1920 John H. Hanan, together with Herbert W. Hanan (defendant's testator) and Addison G. Hanan, had executed their joint and several bond to the guardians of the estates of certain infants in the sum of $60,000 and as collateral security therefor John H. Hanan had assigned to the obligees the bond and mortgage first mentioned; and that thereafter the bond of John H. Hanan, Herbert W. Hanan and Addison G. Hanan had been assigned, together with the bond and mortgage first mentioned, to the plaintiff.

A copy of the bond in suit was annexed. It recited that it was executed as additional security for the payment of the first mentioned bond and mortgage, upon which the principal sum of

$60,000 remained unpaid, and that the time for payment had been extended as provided in a contemporaneous agreement. The condition of the obligation was the payment of that sum with interest as the same should become due and payable according to the terms and conditions of the bond and mortgage first mentioned and the extension agreement.

The amended complaint further alleged that the John H. Hanan Realty Company had failed to comply with the terms of the bond and mortgage first mentioned and had failed to pay the taxes on the mortgaged premises or the interest on the bond; that thereupon, in September, 1933, the plaintiff had brought an action to foreclose the mortgage and that the defendant herein was a party to that action; that pursuant to judgment therein the mortgaged premises were sold and the proceeds were applied on account of the indebtedness due the plaintiff; that the referee's report of sale was confirmed; that thereafter a motion was "duly made for a deficiency judgment" which was denied and the foreclosure action was discontinued as to the defendant herein by the filing of a stipulation; that the deficiency due the plaintiff was $58,523.35 upon which $554.01 had been received by the plaintiff from the receiver in the foreclosure action, leaving due $57,969.34 which the decedent, Herbert W. Hanan, became bound to pay.

The amended complaint and the motion to dismiss for the insufficiency of its allegations contained no mention of a federal question. The trial court granted the motion with the mere statement that "The mortgage moratorium laws apply to the facts alleged in the said complaint". The judgment of dismissal was affirmed by the Appellate Division without opinion. 246 App. Div. 781. The Court of Appeals granted leave to appeal and in May, 1936, affirmed the judgment, also without opinion. 271 N. Y. 564. In the entire progress of the cause to this point of determination by the highest court of the State, the record discloses no reference to a federal question.

In June, 1936, upon motion, the Court of Appeals amended its remittitur by adding the following:

"A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Sections 1083-a, and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate Article I, Section 10, of the Constitution of the United States. This court

held that such laws do not violate said provision of Article I, Section 10, of the Constitution of the United States". 271 N. Y. 662.

It is solely upon this statement in the amended remittitur that we are asked to review the judgment and to pass upon the constitutionality of the state statute. We are not aided by any discussion by the state court of the question thus described, or by its explication or construction of the statute cited, or by a statement of the particular application of the statute to which the paragraph in the amended remittitur is addressed.

Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch* v. *New York,* 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. A certificate or statement by the state court[1] that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.

In *Commercial Bank of Cincinnati* v. *Buckingham's Executors,* 5 How. 317, this Court was asked to decide a question which was said to be presented under the contract clause with respect to the validity of a statute of Ohio. The Supreme Court of that State entered upon its record an elaborate certificate stating that the validity of the statute was drawn in question upon the ground that as applied to the charter of the plaintiffs in error it "impaired the obligations thereof, and was repugnant to the constitution of the

[1] As to the insufficiency of a certificate by the chief justice or presiding justice of the state court, see Railroad Company *v.* Rock, 4 Wall. 177, 178, 180; Powell *v.* Brunswick County, 150 U. S. 433, 439; Sayward *v.* Denny, 158 U. S. 180, 183; Henkel *v.* Cincinnati, 177 U. S. 170, 171; Home for Incurables *v.* New York, 187 U. S. 155, 158; Fullerton *v.* Texas, 196 U. S. 192, 194; Louisville & Nashville R. R. Co. *v.* Smith, 204 U. S. 551, 561; Seaboard Air Line Railway *v.* Duvall, 225 U. S. 477, 481; Connecticut General Life Ins. Co. *v.* Johnson, 296 U. S. 535; Purcell *v.* New York Central R. R. Co., 296 U. S. 545.

United States, and that the decision of this court [the Ohio court] was in favor of the validity of the said act of the legislature as so applied". Notwithstanding the certificate, the case was dismissed for want of jurisdiction. *Id.*, p. 343. The Court said:

"It is not enough, that the record shows that 'the plaintiff in error contended and claimed' that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and 'that this claim was overruled by the court'; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. Let us inquire, then, whether it appears on the face of this record, that the validity of a statute of Ohio, 'on the ground of its repugnancy to the constitution or laws of the United States' was drawn in question in this case". *Id.*, p. 341.

Pursuing that essential inquiry, the Court found that the question decided by the state court was one of the construction of the statute and not of its validity.

In *Lawler* v. *Walker*, 14 How. 149, the Supreme Court of Ohio certified that the validity of statutes of the State had been drawn in question as being in violation of the Federal Constitution and that the court had held the statutes to be valid. The certificate in that case was found to be vague and indefinite but the Court also re-stated the above-quoted ruling of *Commercial Bank of Cincinnati* v. *Buckingham's Executors, supra.* While in *Parmelee* v. *Lawrence*, 11 Wall. 36, the certificate was made by the presiding judge of the state court and not by the court itself, we took occasion to say:

"We will add, if this court should entertain jurisdiction upon a certificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question within the true construction of the 25th section [of the Judiciary Act]". *Id.*, p. 39.

This statement was quoted with approval in *Powell* v. *Brunswick County*, 150 U. S. 433, 439.

The case of *Brown* v. *Atwell*, 92 U. S. 327, affords another illustration of the rule. The judgment was rendered in the Court of Appeals of New York and an entry was made in its record that on the argument of the appeal it was claimed by the appellant that the Act of Congress of 1836, known as the Patent Act, governed

the effect of the several transfers relating to the letters patent appearing in the case, and that the court had decided against the claims urged under that act. This Court observed that, until the certificate of the Court of Appeals, it nowhere appeared in the record that any question was raised as to the effect of the patent laws upon the title under consideration. And the Court said (*id.*, pp. 329, 330):

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it. *Commercial National Bank of Cincinnati* v. *Buckingham's Executors,* 5 How. 341; *Lawler et al* v. *Walker et al.,* 14 *id.* 154; *R. R. Co.* v. *Rock,* 4 Wall. 180; *Parmelee* v. *Lawrence,* 11 *id.* 38.

"The same cases also establish the further rule that 'the office of the certificate, as it respects the Federal question, is to make more specific and certain that which is too general and indefinite in the record, but is incompetent to originate the question.' "

The Court found that the record did not present the federal question to which the certificate referred and the case was accordingly dismissed.

The rule was succinctly stated in *Rector* v. *City Deposit Bank,* 200 U. S. 405, 412, as follows:

"It is elementary that the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise, it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists."

Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the federal question was properly raised and was necessarily determined. Our decisions in cases where certificates have been found useful should be read in the light of that fundamental consideration. In *Marvin* v. *Trout,* 199 U. S. 212, 223, as explained in *Consolidated Turnpike Company* v. *Norfolk etc. Rwy. Co.,* 228 U. S. 596, 599, there was "a record disclosure of the existence of the Federal question", which was also

certified. In the latter case it was assumed that the certificate, made by order of the state court, operated to show that some federal question was decided, but on examining the record this Court found the question to be unsubstantial and denied rehearing, the case having previously been dismissed for want of jurisdiction. *Id.*, p. 603. The record in *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179, 182, showed that the federal question had been raised and the certificate aided in disclosing that the question was not treated as having been raised too late under the local procedure, a point upon which the state court was the judge. Applying the rule, in *Rector* v. *City Deposit Bank, supra*, the Court concluded that as the suit was brought by a trustee in bankruptcy by virtue of the authority conferred upon him by the act of Congress the certificate made "clear the effect, if it were otherwise doubtful, that rights under the bankrupt law were relied upon and passed upon below". See, also, *Capital City Dairy Co.* v. *United States*, 183 U. S. 238, 243, 244. It was in the light of these decisions that the question was presented in *Whitney* v. *California*, 274 U. S. 357, 360-362. The writ of error had been dismissed for want of jurisdiction (269 U. S. 530) and a motion for rehearing was granted. *Id.*, p. 538. The Court of Appeal of the State, as an addition to the record, entered an order stating that the question whether the California Criminal Syndicalism Act and its application were repugnant to the Fourteenth Amendment to the Federal Constitution was considered and passed upon by the court. While this Court said that the record did not show that the defendant had raised or the state court had decided a federal question except as it appeared from that order, the record did disclose facts indicating the presence of the federal question which the order of the state court said was actually presented and decided, and accordingly jurisdiction was entertained. And it has been in recognition of the established principle governing the exercise of our jurisdiction, and not as a departure from it, that we have said that opportunity might be afforded upon seasonable application to obtain a certificate from the state court where it appeared that an appropriate certificate might lead to a better understanding of the record. See *Lynch* v. *New York, supra; International Steel Co.* v. *Surety Co.*, 297 U. S. 657, 662.

In some of the cases cited above, we found from our examination of the record that, notwithstanding the certificate, the decision of the state court rested upon an adequate non-federal ground and hence we were without jurisdiction. See *Commercial Bank*

of Cincinnati v. *Buckingham's Executors, supra; Brown* v. *Atwell, supra; Powell* v. *Brunswick County, supra.* A similar result follows where, even assuming that the state court has formally determined a federal question, it does not appear to have been a substantial one. See *Consolidated Turnpike Company* v. *Norfolk etc. Rwy. Co., supra.* In other cases an examination of the record has left the Court in doubt as to what has actually been determined. That is the situation in the present case.

The appellee points to the provision of Section 1078 of the Civil Practice Act of New York (enacted long before the so-called moratorium acts) that, after final judgment for the plaintiff in a foreclosure action, no other action shall be maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought. In the instant case the amended complaint does not allege that such leave was obtained. We are also advised of decisions by the state court, prior to the one here sought to be reviewed, construing Chapter 794 of the Laws of New York of 1933 (Sections 1083-a and 1083-b of the Civil Practice Act) to which the amended remittitur refers. That Act (Section 1083-a) forbids a judgment for any residue of the debt, remaining unsatisfied after sale of the mortgaged property, except as therein provided. Provision is made for an application by the creditor in the foreclosure action for leave to enter a deficiency judgment, and thereupon the court is to determine the fair and reasonable market value of the mortgaged premises and is to make an order directing the entry of a deficiency judgment, which is to be for an amount equal to that remaining due less the market value as determined or the sale price of the property whichever shall be the higher; and if no motion for a deficiency judgment is thus made, the proceeds of the foreclosure sale are to be regarded as full satisfaction of the mortgage debt "and no right to recover any deficiency in any action or proceeding shall exist". Section 1083-b provides that in actions, other than foreclosure actions, to recover for an indebtedness secured solely by a mortgage on real property and originating simultaneously with such mortgage and secured thereby, against any one "directly or indirectly or contingently liable therefor", the party against whom the money judgment is demanded shall be entitled to set off the reasonable market value of the mortgaged property less prior liens. The Court of Appeals had sustained the constitutional validity of this legislation which would seem to be applicable to an action upon a collateral bond such as that described in the amended complaint herein. See *Klinke* v. *Samuels,*

264 U. S. 144; *City Bank Farmers Trust Co.* v. *Ardlea Incorporation,* 267 U. S. 224.

With these recent decisions in mind, it may be, as has been suggested, that the Court of Appeals considered the federal question, which it described in the amended remittitur as relating to the validity of Sections 1083-a and 1083-b, to be no more than a challenge of the requirement that the right to a deficiency judgment should be heard and determined in the foreclosure action, and sustained the validity of that requirement, without reviewing, or deeming it necessary to review, the questions which could have been raised, and if properly raised could have been brought to this Court in the foreclosure action to which both the plaintiff and defendant herein had been parties. Whether this view of the action of the state court is the correct one, we are unable satisfactorily to determine. If its decision was in truth based upon the theory that by a proper construction of the statute or for any other reason the extent of the deficiency or the right to recover it had been finally determined in a prior litigation, there was no longer a necessity to inquire whether the statute would be constitutional in its application to a different case—a case lacking the feature of any prior determination—, and an answer to that inquiry would be superfluous, even if attempted.

In the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. We have applied this principle to cases coming from state courts where supervening changes had occurred since the entry of the judgment, and where the record failed adequately to state the facts underlying the decision of the federal question. See *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Villa* v. *Van Schaick,* decided December 7, 1936. We have afforded an opportunity for appropriate presentation of the question by an amendment of the record as the state court might be advised. *Villa* v. *Van Schaick, supra.* We think that a similar opportunity should be accorded here in order that uncertainty may be removed and that the precise nature of the federal question, how it was raised and the grounds of its disposition, may be definitely set forth, so that we may be able to decide whether a substantial question within our jurisdiction has necessarily been determined.

For that purpose the judgment is vacated and the cause is remanded for further proceedings.

It is so ordered.